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IN THE

Supreme Court of the United States

PIRELLI ARMSTRONG TIRE CORPORATION,
Petitioner,

v.

CLAY K. JAMES, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does an employer breach its ERISA fiduciary duty when, having expressly reserved its right to change an ERISA plan in the plan documents, it later accurately describes future benefits under the terms of the existing welfare plan without repeating that it has the power to change the plan, and still later exercises its right to change benefits?

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PETITION FOR A WRIT OF CERTIORARI

The Sixth Circuit's decision—that Pirelli Armstrong Tire Corporation breached its fiduciary duty when it accurately informed employees that its ERISA plan provided a certain level of benefits for life, and because it recommended the plan and later changed some of those benefits in accordance with its expressly reserved right to amend or terminate those benefits—is an egregious misapplication of the ERISA fiduciary duty standard and is in conflict with the authority of other circuits. It cannot be reconciled with other circuits' holdings that an employer does not breach its fiduciary duty when it fails to accompany an accurate description of future plan benefits with a repetition of its right to amend or terminate the plan contained in the plan documents. The court of appeals' decision threatens to undermine the holdings of those circuits, and to injure both employers and

employees, by making companies in different circuits subject to varying standards in administering ERISA plans, and making companies with multi-state operations simultaneously subject to differing standards in administering a single plan.

The decision below also, as a practical matter, has placed an impossible burden on ERISA fiduciaries. If the decision stands, any accurate oral description of future benefits under the plan's existing terms, if unaccompanied by a repetition of the administrator's right to change the plan, will effectively vest those benefits to employees who hear and rely on the description and thereby vitiate the reservation of rights contained in the written plan documents. Congress's intent to encourage employee-benefit plans by giving employers the flexibility to use welfare benefit plans will be severely undercut, and employers will be discouraged from counseling employees about benefit plans, or even from providing them at all. For the many ERISA plan employers who are unaware of the decision below, it creates the potential for enormous and unintended liabilities, even for those employers who accurately and in good faith simply describe existing benefits. Accordingly, the Court should grant certiorari and reverse the decision below.

CITATION OF COURT OF APPEALS OPINION

James v. *Pirelli Armstrong Tire Corp.*, 305 F.3d 439 (CA6 2002).

BASIS FOR JURISDICTION

The United States Court of Appeals for the Sixth Circuit delivered its judgment and opinion in *Pirelli* on March 20, 2002. The petition for rehearing en banc was denied on December 11, 2002. The Court has jurisdiction to hear this petition for certiorari under 28 U.S.C. §1254.

STATUTES INVOLVED

"(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title)."

29 U.S.C. §1104.

STATEMENT OF THE CASE

Pirelli operated a tire production facility in Madison, Tennessee. All of the plaintiffs below were salaried employees at the Madison plant. Armstrong purchased the plant in 1973 from Gates Rubber; and Pirelli acquired the plant in 1988. App. 31a, 32a.

Armstrong provided medical benefits for its salaried employees and retirees through group insurance contracts with Connecticut General Life Insurance Company. Through 1992, employees of the plant (under both Pirelli and the former ownership) always received the same medical benefits after retirement that they had received when they retired. App. 31a-34a. Each of the 1980, 1984, and 1988 policies with Connecticut Life, however, expressly authorized the amendment or termination of the policies by Armstrong. App. 31a-32a. In 1981, Armstrong gave each of its salaried employees a summary plan description (SPD) describing medical benefits. The 1981 SPD included a provision expressly notifying the employees that Armstrong reserved the right to terminate medical benefits. App. 31a. In 1989, Pirelli distributed a new SPD that contained an express reservation of Pirelli's right to modify or terminate the medical benefit plan at any time. App. 33a. Each of the respondents was given one of the SPDs containing a reservation-of-rights clause. App. 31a-32a.

In July 1990, Pirelli implemented its Optional Pension/ Severance (OPS) program, which was designed to reduce the number of salaried employees by providing incentives to voluntary retirement. App. 32a.[1] Pirelli provided written

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[1] In late 1989, Pirelli announced that there would be changes in the method of calculating deductibles and out-of-pocket maximums for those who retired after January 1, 1991. Later in 1990, Pirelli announced and held meetings to inform employees about the OPS program. The OPS program was designed to provide retirement incentives, including the "bridging" of age or service to enable those not yet eligible for full

descriptions of the OPS program to its salaried employees. In addition, corporate headquarters gave information to Pirelli's plant managers to present to salaried employees. That information included a script for the plant manager to read to the employees at group meetings, a slide presentation, and a recorded audio presentation. App. 34a.

The plan was described to respondents in 1990 by either Charles Wright, the plant manager, or Shirley Pike, a human resources liaison. Respondents claimed that in individual conversations with Wright, Pike, or both, they were told that their health benefits would continue "for life," "for the term of their retirement," or "during retirement," and that when asked about benefits, Pike and Wright did not repeat the reservations of rights contained in the SPDs.[2] No respondent

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pensions to receive unreduced pensions anyway. The OPS program also included certain enhanced insurance benefits for vision care and dental care as well as severance pay. App. 35a. Like all others who retired before the end of 1990, OPS retirees avoided the changes in deductibles and out-of-pocket maximums that went into effect on January 1, 1991. In addition, those OPS retirees who elected to participate in the program in 1990 but whose actual retirement was postponed by agreement with Pirelli until after January 1, 1991, still received the pre-1991 formula for deductibles and out-of-pocket maximums. The enhanced benefits for OPS retirees were delivered and are not the subject of this lawsuit. App. 37a. Similarly, the changes in the method of calculating deductibles and out-of-pocket maximums on January 1, 1991, did not affect the plaintiffs and are not the basis of the plaintiffs' claims.

[2] The district court found that Shirley Pike, in describing Pirelli's plan to pay retirees medical benefits until their death, told Clay James, Ernest Custer, John G. Carney, Dean Carney, Ruby Panzera, Andrew Panzera, B. L. Cook, Robert Adkins, Paul Skelley, Jr., Doyle Denton, Dewey Meador, Bobby Richardson, Ron Fitzsimmons, Leroy Kemp, James Wallace, and Vada Haston that they and, if applicable, their spouses would retain their medical benefits "for life." App. 38a-39a. The district court found that Donald Rosso was told the same thing by Charles Wright. App. 38a. Joe Smith alleges that Pike told him "she thought there was a change coming and if you was going to retire, 1990 would be the time to get out," although the district court made no findings in regard

ever alleged or testified that a Pirelli representative told them that the ERISA plan "could not" be changed. App. 37a-39a.

The district court found that Ms. Pike misinterpreted and misstated the reservation-of-rights clause contained in the SPD to two plaintiff-employees by indicating that it referred only to the employer's right to switch insurers. App. 48a-49a. The district court ruled in favor of those two employees, and their claims have been settled. *Id.* The district court, however, after a full trial on the merits, found no similar inquiries by or misstatements to any of the plaintiffs who were parties on appeal. App. 54a-55a. Furthermore, none of those plaintiffs had any information or offered any evidence suggesting either that they were deliberately misled by Pirelli officials or that Pirelli had any plans, at the time of the conversations or when they retired, to modify their retiree medical benefits years later. *Id.*

Nearly two years later, in November 1992, the President and CEO of Pirelli presented its board of directors with a proposal for a new health care plan, which changed the plan's medical benefits terms for both current employees and retirees such as respondents. In 1993, Pirelli adopted the new plan. App. 37a.

At trial, plaintiffs did not allege that their medical benefits had been terminated, or even that the coverage had been reduced; rather, they alleged that the 1993 plan change caused an increase in their health care costs by increasing their share of the payments under the welfare plan. Plaintiffs sued Pirelli for breach of the benefits plan, breach of fiduciary duty, equitable estoppel, breach of contract, and failure to comply with ERISA's requirement to supply

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to Smith. *See* App. 10a, 38a. In fact, the changes in the method of calculating deductibles and out-of-pocket maximums implemented on January 1, 1991, did not affect Smith or anyone else who retired before that date, including the OPS retirees.

written information describing plan benefits. App. 39a-40a. The district court granted summary judgment for Pirelli on the breach-of-plan claim, and after a full bench trial, rendered judgment for Pirelli on all claims, except as to the two plaintiffs who had inadvertently been given an incorrect interpretation of the reservation-of-rights clause by Pike. App. 55a.

The court of appeals reversed, holding that Pirelli breached its fiduciary duty to plaintiffs. The court of appeals did not address the district court's factual findings regarding the meaning of the various communications between Wright, Pike, and the plaintiffs, concluding instead that those communications, by failing to volunteer the existence of rights set out in the plan documents, were misrepresentations as a matter of law. App. 28a.

REASONS FOR GRANTING THE PETITION

The Court should grant this petition to clarify the nature of the fiduciary duty owed to present and former employees under an ERISA welfare plan. When an employer offers a welfare plan for employees, it is necessary to accurately inform employees about the benefits that the plan will offer employees in the future, but those benefits are not vested and the employer generally reserves the right to unilaterally modify the terms of the plan. Whenever an employer modifies an ERISA welfare plan, the future benefits an employee enjoys necessarily will be different from those explained (truthfully) prior to the modification.

Pirelli's welfare plan provided benefits to employees and retirees for the rest of their lives. App. 33a-34a, 38a-39a. When Pirelli told employees that they would enjoy the benefits of its welfare plan "for life," "for the term of their retirement," or "during retirement," those statements accurately reflected the terms of the welfare plan. *Id.* When the court of appeals held that those statements constituted a

breach of fiduciary duty as a matter of law, the court imposed an affirmative duty on Pirelli not only to accurately explain to respondents the future benefits under the plan—which it did, as the district court found—but also to volunteer a uniform disclaimer, repeating the language that already appeared in the plan providing that those benefits could be modified in the future, even when the right to modify had not been raised by either Pirelli or respondents.

The court of appeals' holding is squarely at odds with the holdings of other circuits that an employer who is accurately describing plan benefits need not warn about the possibility of future changes, or even disclose potential changes that may have been raised internally unless those plans are under "serious consideration." The decision also conflicts with other circuits' holdings that there is a strong presumption against interpreting an employer's oral comments in such a way as to vest benefits. As a practical matter, if employees can successfully sue for breach of fiduciary duty based on a theory of misrepresentation by omission in an accurate oral communication, then employers, who by law retain the right to alter ERISA welfare plans, will effectively lose that right. ERISA's statutory requirement that the plan be written will be undermined, and countless employee lawsuits will arise arguing that benefits will be vested not by what an employer said, but by what the employer did not say, and about which the employee did not even ask.

Indeed, if faced with the possibility that a representative's accurate description of future benefits can effectively vest benefits, many employers may choose either not to meet with employees to discuss plan benefits or simply not to provide ERISA-qualified welfare plans at all. The Court should therefore grant certiorari to clarify the duty owed when an ERISA fiduciary describes future benefits.

I. ERISA DOES NOT IMPOSE A GENERAL DUTY TO WARN ABOUT POTENTIAL FUTURE CHANGES IN BENEFITS.

A. The Courts of Appeals Are in Conflict on the Disclosure Obligations of ERISA Fiduciaries Regarding Potential Future Changes in Benefits.

Given the popularity of ERISA welfare benefit plans, the fact pattern presented by this case arises with predictable regularity. Frequently, an employer accurately orally describes a plan to its employees, and then later reconsiders and decides to amend the plan pursuant to its reserved right to terminate or amend the plan contained in the official plan documents. At that time, the employer's previous description of the plan becomes obsolete and is superseded by the new plan.

It is not uncommon for an employee or retiree in this situation to sue on the theory that the then-accurate oral description of plan benefits effected a contract never to change benefits or that the initial accurate description of benefits was a misrepresentation of future benefits under the plan. Despite the frequency of this type of litigation, the circuits have not reached a consensus on how to deal with it. Indeed, the situation is so confused that two circuits —the Sixth and the Third—have cases on both sides of the issue. The decision in this case further confuses the legal landscape.

The majority of courts have declined to hold an employer liable when, after a plan change, an employee alleges that an earlier description of plan benefits was a breach of fiduciary duty by misrepresentation. Most courts have recognized that employers generally retain the ability to terminate or amend ERISA welfare plans and that a temporal statement regarding the duration of benefits under a plan should not be interpreted as either a vesting of the benefits or a waiver of

the employer's right to terminate or amend the plan. *See Frahm* v. *Equitable Life Assurance Soc. of United States*, 137 F.3d 955, 959-60 (CA7 1998) (holding that when employer described benefits using the word "lifetime," but omitted to repeat that the employer reserved the right to terminate the plan, and the plan was later terminated, there had been no breach of fiduciary duty); *Wilson* v. *Southwestern Bell Tel. Co.*, 55 F.3d 399, 405 (CA8 1995); *Sprague* v. *Gen. Motors Corp.*, 133 F.3d 388, 394 (CA6 1998) (en banc); *but see* App. 29a; *Nester* v. *Allegiance Healthcare Corp.*, 315 F.3d 610, 614 (CA6 2003) (Clay, J., concurring) (stating in dicta that, while plaintiffs' breach claim necessarily failed, under *James* plaintiffs might have brought successful breach of fiduciary duty claim under plan offering eight years of special transition contributions, which ended when plaintiffs were later terminated); *Abbruscato* v. *Empire Blue Cross & Blue Shield*, 274 F.3d 90, 94-95 (CA2 2001) (holding that jury could find a breach of fiduciary duty when employer reduced retiree insurance coverage, because plan language recited that the coverage would "remain[] in force for the rest of your life," notwithstanding language reserving right to terminate or amend the plan); *Devlin* v. *Empire Blue Cross & Blue Shield*, 274 F.3d 76, 88-89 (CA2 2001) (same); *In re Unisys Corp. Retiree Med. Ben. ERISA Litig.*, 57 F.3d 1255, 1259 (CA3 1995) ("*Unisys I*") (holding that employer breached its fiduciary duty when it reduced benefits because plan language indicated that benefits would "be continued for the rest of your life," notwithstanding language reserving right to terminate or amend plan).

A statement describing the duration of benefits under an ERISA welfare plan cannot reasonably be interpreted as an additional, implied representation that the employer will not subsequently change those benefits. An employer has no duty of "prevision;" that is, the employer does not make a misrepresentation by failing to inform employees of a change that it was not, at that time, even contemplating making. *See*

Frahm, 137 F.3d, at 959-60; *cf. Flanigan* v. *Gen. Elec. Co.*, 242 F.3d 78, 85 (CA2 2001) ("We do not require an ERISA fiduciary to be perfectly prescient as to all future changes in employee benefits.") (quoting *Mullins* v. *Pfizer, Inc.*, 23 F.3d 663, 669 (CA2 1994)).

In *Frahm*, individual employees testified that they were given advice from corporate representatives that "stressed the availability of 'lifetime' benefits and omitted the qualifier" that the employer reserved the right to change or terminate the plan. *Id.*, at 959. Eventually, the employer changed the plan to require retirees to make copayments for some medical services. *See id.*, at 956. *Frahm* concluded that construing the earlier communications as a breach of fiduciary duty would impose an impossible burden on the employer because of the difficulties of describing benefits that were intended and designed to extend indefinitely, but which the employer retained the right to change:

> "Plans are complex, and the possibility of change in the plans makes exposition and decision difficult. How best should a benefits department express the idea that although it is the employer's current *policy* to freeze the benefits of retirees, this is not its legal *obligation*? Many persons . . . won't grasp the difference when the policy has been unchanged for decades." *Id.*, at 959.

Frahm concluded that finding a misrepresentation based on the employer's then-accurate use of the word "lifetime" to describe benefits would create a doctrine of misrepresentation by omission, and imposition of liability because "the company did not tell the early retirees at every possible opportunity that which it had told them many times before—namely, that the terms of the plan were subject to change." *Frahm*, 137 F.3d, at 960 (quoting *Sprague*, 133 F.3d, at 405). Accordingly, the court refused to find a breach of fiduciary duty when the employer accurately described future benefits,

did not repeat its expressly reserved right to alter or terminate the plan, and later changed the plan.

Many circuits have gone even further in protecting employers from charges that, in describing a plan that was later changed, the employer made a misrepresentation. The Seventh, Eighth, and, prior to this decision, the Sixth Circuits have held that an employer asked about future changes in benefits plan need not repeat a reservation of rights already contained in the plan documents. Many circuits have held that an employer, when faced with the same question, need not even disclose the fact that it is considering plan changes until those changes are under "serious" consideration. *Mushalla* v. *Teamsters Local No. 863 Pension Fund*, 300 F.3d 391, 396 (CA3 2002); *Fischer* v. *Pa. Elec. Co.*, 96 F.3d 1533, 1539 (CA3 1996); *Bins* v. *Exxon Co. U.S.A.*, 220 F.3d 1042, 1049 (CA9 2000) (*en banc*); *Hockett* v. *Sun Co., Inc.*, 109 F.3d 1515 (CA10 1997); *Barnes* v. *Lacy*, 927 F.2d 539, 544 (CA11 1991); *cf. Mullins*, 23 F.3d at 668 (CA2 1994). Thus, while employers in the Sixth Circuit must respond to questions about future benefits with a repetition of a right *made clear in the plan documents*, employers in the Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits could respond to that question without even disclosing initial consideration of plan changes that employees *would have no reason to know about*. *Id.*; App. 27a-28a.

This decision not only disrupts the holdings of these circuits by subjecting employers to varying standards in different jurisdictions, but also upsets the settled expectations of the employers and employees who do business in them. Employers in different circuits are subject to different rules, and even a single employer who operates across the circuits is subject to conflicting requirements in administering a single plan. A Memphis-based employer with plants in St. Louis and Chicago, for instance, would be subject to different rules. Suppose employees in St. Louis and Chicago are

accurately told that the company's welfare plan provides certain medical benefits for life; no contemplated modification was under serious consideration at the time the statement is made to the employees; no one asks and the employer simply does not mention any rights to amend or terminate that were expressly reserved in the plan, as confirmed in the SPDs; and pursuant to such rights, the company later modifies those benefits. If the employees later sue alleging a breach of fiduciary duty, the company will be entitled to summary judgment, *if* the employees sue in St. Louis and Chicago. *See Wilson*, 55 F.3d, at 405; *Frahm*, 137 F.3d, at 959-60. But, if the employees sued in Memphis instead, the employees, not the employer, would win as a matter of law under the court of appeals' decision. In other words, the simple decision whether to file suit in Chicago or Memphis would decide, as a matter of law, whether the employee or employer won the lawsuit, thus raising the likelihood of forum shopping by employees.

B. If Accurate Descriptions of Future Non-Vested Benefits, in the Absence of an Express Recitation of the Right to Amend, Are Interpreted as Affirmative Misinterpretations, Then Every Description Will Vest Benefits.

The court of appeals predicated its holding both on the theory that Pirelli committed a misrepresentation by omission and on the theory that Pirelli affirmatively misrepresented its power to change the plan. App. 27a. But if the language used by Pirelli is interpreted to indicate that it lacked the power to change benefits, then every oral statement by an employer representative accurately describing future benefits under a plan as it then exists must be understood to vest those benefits.

In contrast to the court of appeals, the district court found a breach of fiduciary duty *only* as to the only two employees who received an inaccurate answer from Pike as to whether

Pirelli could amend the plan. App. 55a. These two employees were not appellants below. App. 12a. Nevertheless, the court of appeals found that Pirelli had made misrepresentations to *all* of the plaintiffs, without relying on the district court's findings as to the meaning of the communications at issue. App. 27a. Nor did the court remand to the trial court for it to make a finding on the meaning or the specific contents of the language Pike and Wright used with appellants. *Id.* Instead, the court of appeals concluded that what Pike and Wright said was a misrepresentation as a matter of law.

But the only way that the alleged statements at issue in this case can be understood as affirmative misrepresentations, and not misrepresentations-by-omission, is if the phrase "for life" were understood to indicate not the existing terms of the plan, but the totally distinct concept (contradicting the express plan documents and summaries) that Pirelli "could not" change the plan. The court of appeals, attempting to bring the facts within the affirmative misrepresentation line of cases, reached exactly that conclusion. App. 27a ("Pike provided inaccurate information when she indicated to employees that the company could not change their benefits during retirement."). But the court did not explain how the phrase "for life" indicates that Pirelli had surrendered its previously (and expressly) reserved power to change the plan. *Id.* Nor did the court explain why it ignored the findings of fact of the district court, which, after a full bench trial, found that Pirelli had *not* indicated to respondents—as opposed to the two plaintiffs who prevailed below—that it could not change the plan. App. 37a-39a.

The use of the phrase "for life"—which did accurately describe the plan provisions then extant—did not indicate that Pirelli lacked the capacity to change the plan. Rather, it conveyed the duration of the plan at the time it was described, and it did so in a way that meaningfully distin-

guished the structure of the plan from other possibilities. Specifically, as explained to the respondents, it conveyed the fact that those who retired under the OPS would receive the 1990-level deductible and out-of-pocket maximum, and that the plan was designed to pay those benefits until death. The existing plan *could* have provided, as is not uncommon, that medical benefits would terminate when an employee became eligible for Medicare, *see, e.g.*, *Maurer* v. *Joy Techs., Inc.*, 212 F.3d 907, 912 (CA6 2000), but it instead was structured to provide benefits until a retiree's death. In other words, it provided benefits "for life."

Nor does the fact that the phrase "for life" indicates that benefits will extend into the future make it qualitatively different from *any* description of future benefits. Welfare plans can be designed to terminate after a period of years, or they can be designed—as this one was—to last until death—and *somehow* this information should be conveyed to plan participants. If Pike and Wright's comments could be understood to be misrepresentations, then any phrase that indicates that welfare benefits extend into the future must similarly be accompanied by a repetition of the reservation-of-rights clause or be deemed a misrepresentation. For this reason, other courts have not generally read accurate descriptions of future benefits under an existing plan to constitute promises that those benefits cannot be cancelled. Employers who accurately describe an existing plan by noting that life insurance coverage "shall remain" at a certain figure, for instance, do not thereby inadvertently vest that benefit or incur liability for breach of fiduciary duty if the coverage is later cancelled. *See Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., U.A.W.* v. *Skinner Engine Co.*, 188 F.3d 130, 141 (CA3 1999); *see also Sengpiel* v. *B.F. Goodrich Co.*, 156 F.3d 660, 668 (CA6 1998) (plan stating that participants "shall continue to have the same health coverage" does not vest benefits); *cf. Gable* v. *Sweetheart Cup Co.*, 35 F.3d 851, 857 (CA4 1994) (fact

that non-plan documents "referred to retirees' benefits as 'lifetime benefits' does not nullify the company's right to modify" plan). The Seventh Circuit similarly noted that an employer's representatives' statements that benefits were "lifetime" benefits were not material misrepresentations when the plan was later changed, *see Frahm*, 137 F.3d, at 959; and the Sixth Circuit itself reached the same conclusion. *Sprague*, 133 F.3d, at 394.

Because this case does not involve an affirmative misrepresentation, it is inapposite to *Varity Corp.* v. *Howe*, 516 U.S. 489 (1996). In *Varity*, an employer's statements were found to be misrepresentations because they inaccurately portrayed an existing set of affairs, not because they constituted inaccurate but honest predictions. The employer in *Varity*, unlike Pirelli, misrepresented an existing set of facts: it told employees that it believed the future was "bright" for a company that was offering a new plan that employers could switch into, when in fact it believed the opposite. *Id.*, at 504. Here, by contrast, when Pike and Wright told employees that their benefits were for life, it was not because they were trying to deliberately mislead them into believing that Pirelli could not change the plan, but because at the time under the plan there were benefits for life, and Pirelli had no intent to change the plan. App. 48a.

The court of appeals also relied on *Unisys I*, 57 F.3d 1255, to support its holding. App. 25a-26a. To the extent that *Unisys I* concludes that the use of the word "lifetime" was a misrepresentation of the existing plan notwithstanding that at the time the plan did provide for, and the employer intended to pay, lifetime benefits, 57 F.3d, at 1265, it is wrongly decided and itself conflicts with *Frahm* and *Gable*. *Unisys I* makes the same error the decision below did: it concluded that the use of the phrase "lifetime" was a misrepresentation without explaining how that specific language differed from the ordinary prospective language used to describe

future benefits under a plan. *Id.* *Unisys I* conflicts not only with *Sprague* and *Frahm*, but also categorically with the serious-consideration standard adopted by many courts. *See* §I.A., *supra*.

Because the language used by Pike, Wright, and the administrators in *Pirelli* is no different from any description of future benefits, the Court should grant this petition to clarify that an employer does not, under a 20/20 hindsight analysis, make a misrepresentation any time it accurately describes future benefits merely by failing to repeat its right to alter the plan that already appears in the plan documents, and then years later making a previously uncontemplated change to the plan.

II. THE DECISION BELOW UNDERMINES THE CONGRESSIONAL POLICIES UNDERLYING ERISA.

A. The Decision Below Contravenes Congressional Intent to Increase Employee Benefit Plans by Allowing Unvested Benefits.

ERISA recognizes two types of employee benefit plans: pension plans and welfare plans. *See In re Unisys Corp. Retiree Med. Benefit ERISA Litig.*, 58 F.3d 896, 901 (CA3 1995) ("*Unisys II*"). Welfare plans provide "medical, surgical or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment." Pension plans provide (i) retirement income to employees, or (ii) result in a deferral of income by employees for periods extending to the termination of covered employment or beyond. 29 U.S.C. §§1002(1), (2)(A). ERISA contains extensive vesting requirements for pension plans, but does not require automatic vesting of welfare benefit plans. *See Smith* v. *Hartford Ins. Group,* 6 F.3d 131, 136 (CA3 1993).

This was not merely an oversight on the part of Congress. Rather, vesting requirements were not established for employee welfare plans because Congress determined that "[t]o require the vesting of these ancillary benefits would seriously complicate the administration and increase the cost of plans whose primary function is to provide retirement income." *Hozier* v. *Midwest Fasteners, Inc.*, 908 F.2d 1155, 1160 (CA3 1990) (quoting H.R. REP. NO. 93-807, (1974), *reprinted in* 1974 U.S.C.C.A.N. 4670, 4726; S. REP. NO. 93-383, (1974), *reprinted in* 1974 U.S.C.C.A.N. 4889, 4936)). Congress foresaw that if employers addressed the uncertainties of rising medical costs and innocent misstatements "by decreasing benefits under existing plans or slowing the rate of formation of new plans, little if anything could be gained [in terms of] securing broader use of employee [benefit] plans." H.R. REP. NO. 93-807 As the Second Circuit has observed:

> "Automatic vesting was rejected because the costs of such plans are subject to fluctuating and unpredictable variables. Actuarial decisions concerning fixed annuities are based on fairly stable data, and vesting is appropriate. In contrast, medical insurance must take account of inflation, changes in medical practice and technology, and increases in the cost of treatment independent of inflation. These unstable variables prevent accurate predictions of future needs and costs." *Moore* v. *Metro. Life Ins. Co.*, 856 F.2d 488, 492 (CA2 1988).

Denying employers the right to alter welfare benefit plans "would strip employers of the protection that Congress intended to provide them and accordingly 'discourage employers from offering any insurance at all.'" *Gable*, 35 F.3d, at 860 (quoting *Owens* v. *Storehouse, Inc.*, 984 F.2d 394, 398 n.5 (CA11 1993)).

The obligation imposed by the Sixth Circuit through its theory of misrepresentation by omission—as a "guarantor of

accurate information at all times and for the indefinite future," *Frahm*, 137 F.3d, at 959-60—is so broad that it threatens Congress's intent to allow unvested welfare plans. Indeed, the effect of requiring constant voluntary repetition of the fact that an employer retains the right to change a plan would be to diminish the effect of the statement itself. As courts have recognized, too low a standard of fiduciary duty "could result in an avalanche of notices and disclosures," and any potential warning "would become meaningless if cried too often." *See Bins*, 220 F.3d, at 1049 (citing *Fischer*, 96 F.3d, at 1539). Furthermore, repeated disclosure of the right even in the absence of any employer consideration of change could lead employees to incorrectly suspect that changes are being considered and thus to make decisions based on inaccurate impressions.

More problematically, a requirement that employers describing plans restate their already-disclosed rights "at every possible opportunity" will at some time be breached even by employers acting in good faith and exercising prudence, as is required by statute. *See* 29 U.S.C. §1104. It also inevitably will prompt a new cottage industry of litigation involving swearing contests by plan beneficiaries who, whether because they simply forgot or misunderstood, assert they relied on the oral "misrepresentation." *Cf. Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 746 (1975) (limiting 10b-5 securities fraud claims to actual purchasers and sellers of securities in part because those who asserted that they held shares in reliance on a misrepresentation would create a cause of action in which "Plaintiff's entire testimony could be dependent upon uncorroborated oral evidence of many of the crucial elements of his claim.") If the court of appeals' decision stands, it:

> "might lead the employer to discontinue giving advice, telling participants to read the documents and draw their own conclusions. That step would protect employers,

but it very likely would increase the level of misunderstanding among participants." *Frahm*, 137 F.3d, at 960.

B. The Decision Below Undermines the Congressional Policies Underlying the Requirement of Written Plan Documents.

The court of appeals' decision also undermines Congress's decision to require that ERISA plans be governed by written documents specifying amendment procedures. 29 U.S.C. §§1102(a)(1), 1102(b)(3). The rationale behind this policy is straightforward:

> "Were all communications between an employer and plan beneficiaries to be considered along with the SPDs as establishing the terms of a welfare plan, the plan documents and the SPDs would establish merely a floor for an employer's future obligations. Predictability as to the extent of future obligations would be lost, and, consequently, substantial disincentives for even offering such plans would be created." *Moore*, 856 F.2d, at 492.

The decision of the court of appeals undercuts the authority of the written plan documents by allowing an employer's representative's oral comments to effectively amend the plan.

The writing requirement serves a dual function. It "protects employees from having their benefits eroded by oral modifications to the plan" and also "protects the plan's actuarial soundness by preventing plan administrators from contracting to pay benefits to persons not entitled to such under the express terms of the plan." *Perreca* v. *Gluck*, 295 F.3d 215, 225 (CA2 2002). "The statutory language of § 1102(a)(1) is clear and concise and must be enforced as written. To hold otherwise would not only thwart congressional purpose and intent, but would afford less protection to employees and their beneficiaries." *Cefalu* v. *B.F. Goodrich Co.*, 871 F.2d 1290, 1296 (CA5 1989).

Recognizing the importance of providing an authoritative, written source for determining a plan's meaning, courts have generally rejected arguments that a plan participant was entitled to vested benefits based on unofficial documents, and even more uniformly have rejected arguments that benefits were vested by oral communications. Participants have tried to argue that benefits were vested under differing legal theories. Some have argued that unofficial communications established new contracts, or modified an ERISA plan, in such a way as to vest benefits. These claims have generally been rejected. *See Alday* v. *Container Corp. of Am.*, 906 F.2d 660, 665 (CA11 1990); *see also Moore*, 856 F.2d, at 488; *Cefalu*, 871 F.2d, at 1295-97; *Musto* v. *Am. Gen. Corp.*, 861 F.2d 897, 910 (CA6 1988); *Cent. States, S.E. & S.W.* v. *Gerber Truck Serv., Inc.*, 870 F.2d 1148, 1149 (CA7 1989). Other claimants have attempted to vest benefits by relying on theories of promissory estoppel, but many circuits have concluded that the prohibition on oral amendments to the plan obviates these claims. *Nachwalter* v. *Christie*, 805 F.2d 956, 960 (CA11 1986) ("We agree with the district court that this requirement that ERISA plans be 'maintained' in writing precludes oral modifications of the Plans; the common law doctrine of estoppel cannot be used to alter this result."); *Perreca*, 295 F.3d, at 231 ("[P]laintiffs' claim of promissory estoppel fails because oral promises are unenforceable under ERISA and therefore cannot vary the terms of an ERISA plan."); *Teamsters & Employers Welfare Trust of Ill.* v. *Gorman Bros. Ready Mix*, 283 F.3d 877, 883 (CA7 2002) ("[E]stoppel can't be used to allow oral representations to expand the terms of an ERISA plan."); *Weir* v. *Fed. Asset Disposition Ass'n*, 123 F.3d 281, 289 (CA5 1997) ("An estoppel cause of action is not cognizable under ERISA in suits seeking to enforce rights to benefits based on purported oral modifications of plan terms."); *Barker* v. *Ceridian Corp.*, 193 F.3d 976, 982 (CA8 1999) ("ERISA precludes oral or informal amendments to a plan,

by estoppel or otherwise."); *White* v. *Provident Life & Acc. Ins. Co.*, 114 F.3d 26, 29 (CA4 1997) ("ERISA simply does not recognize the validity of oral or non-conforming written modifications to ERISA plans."); *but see Kane* v. *Aetna Life Ins.*, 893 F.2d 1283, 1286 (CA11 1990) ("[T]he use of the law of equitable estoppel to enforce oral interpretations of employee benefit plans will not affect the ability of employees and beneficiaries to rely on the written terms of such plans."); *Pisciotta* v. *Teledyne Indus. Inc.*, 91 F.3d 1326, 1331 (CA9 1996) (establishing elements for estoppel based on oral communications).

Without considering the implications, the decision below allows respondents to recover under a theory of breach of fiduciary duty what ERISA's express writing requirement forbids them to recover under theories of contract modification and estoppel. The effect is that the holding of *Varity*, which found a breach of fiduciary duty when an employer made an affirmative misrepresentation in part in written documents describing the plan, has been expanded to find a breach based on an accurate oral description of a plan. *See Varity*, 516 U.S., at 499-501. Allowing an action for breach of fiduciary duty based on oral communications that are *not* misrepresentations, but that simply fail to volunteer information that is in the written plan documents, severely undercuts Congress's goal of limiting informal amendments of ERISA plans, and particularly oral amendments of ERISA plans. It makes no sense that ERISA's fiduciary obligation provision would be read to "take[] back with the left hand the primacy of the written word that ERISA establishes with the right hand." *Frahm*, 137 F.3d, at 960.

Given the emphasis Congress has placed both on allowing employers to create unvested plans, and in limiting informal amendments, breaches of fiduciary duty based on oral

statements should only be found when fiduciaries have made an affirmative misrepresentation, and not on a theory of misrepresentation by omission based on after-the-statement events.

CONCLUSION

For all of these reasons, the Court should grant this petition for writ of certiorari.

Respectfully submitted,

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March 10, 2003

APPENDIX A

UNITED STATES COURT OF APPEALS,
SIXTH CIRCUIT

No. 00-6475

CLAY K. JAMES, *et al.*,
Plaintiffs-Appellants,

v.

PIRELLI ARMSTRONG TIRE CORPORATION,
Defendant-Appellee.

Argued: March 21, 2002
Decided and Filed: Sept. 17, 2002

Before BATCHELDER and CLAY, *Circuit Judges*; ALDRICH, *District Judge.*[*]

OPINION

CLAY, *Circuit Judge.*

Plaintiffs, twenty-one former employees of Defendant Pirelli Armstrong Tire Corporation ("Pirelli" or "the company") or its predecessor in interest, Armstrong Rubber Company ("Armstrong"), appeal from the judgment dismissing their claims of breach of fiduciary duty arising under the Employment Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001-1461. During the relevant time periods, Plaintiffs were salaried employees or retired salaried employees at Pirelli's plant in Madison, Tennessee. For the reasons set forth below, we REVERSE the district court's judgment and REMAND the case for further proceedings.

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[*] The Honorable Ann Aldrich, United States District Judge for the Northern District of Ohio, sitting by designation.

BACKGROUND

Pirelli is a Delaware corporation with headquarters in New Haven, Connecticut, and is in the business of tire production. Pirelli bought the Madison, Tennessee plant from Armstrong in 1988. Pirelli provided medical benefits for its salaried employees and retired salaried employees through group insurance policies with Connecticut General Life Insurance Company, including a 1980 policy, a 1984 policy, and a 1988 policy. Pirelli had the right to terminate the 1980 policy by giving the insurance company advance written notice, as well as the right to amend the policy with the insurance company's approval. In 1981, Armstrong gave its salaried employees a Summary Plan Description ("SPD"), which stated as follows under the heading "Termination of Insurance":

> Your insurance will terminate when you are no longer a member of an eligible class of employees, when the group policy terminates or when you are no longer working for the employer, whichever happens first. However, if you retire, your life insurance and your Medical Care Benefits (other than pregnancy benefits) will be continued until the employer stops payment of premiums for you.
>
> The insurance for a family member terminates when your insurance terminates, or when the family member is no longer eligible, whichever happens first.
>
> Under certain circumstances, it may be possible to continue part or all of your insurance during temporary lay-off, plant closures or leave of absence or when you are unable to work because of sickness or injury. It may also be possible for the insurance to continue on your family members after your death. *See* your Benefit Plan Administrator for this information.

The 1981 SPD contained no other language regarding modification or termination of medical benefits. The 1984 and 1988 policies had the same or substantially the same

provisions regarding cancellation and amendment, and the 1981 SPD was relied upon until 1989, when Pirelli distributed a new SPD. This SPD contained a provision in which Pirelli reserved the right to modify or terminate the plan at any time. Under the section concerning the Comprehensive Medical Insurance Plan, the 1989 SPD provided:

D. WHEN YOUR COVERAGE ENDS

Please refer to Section L of the Handbook for details concerning termination of coverage under this Plan.

Similarly, in the section about the Prescription Drug plan, the 1989 SPD provides:

C. WHEN COVERAGE ENDS

Please refer to Section L of the Handbook for details concerning the termination of your coverage in the event you cease to be an active employee. In certain circumstances you may be able to continue to have coverage and this is explained.

However, Section L of the handbook, entitled Termination of Benefits, was left blank when the 1989 SPD was distributed, and Pirelli never issued any materials to be placed in that space. Despite being presented to employees in 1989, the 1989 SPD was not actually implemented until 1993.

From 1986 through 1990, Armstrong and Pirelli, in an effort to reduce their salaried workforce, encouraged employees to take early retirement. After acquiring the Madison plant, Pirelli held a series of meetings in December of 1989, with groups of salaried employees to encourage eligible employees to take early retirement. During these meetings, salaried employees were given copies of the 1989 SPD and were encouraged to consider retirement before the end of 1990 to avoid anticipated increases in the cost of health insurance and other major changes in employees' health insurance benefits, effective January 1, 1991, when an

increase in the cost of health insurance was expected to go into effect.

Thereafter, in July of 1990, Pirelli put into effect an Optional Pension/Severance ("OPS") plan, again seeking to encourage early retirement by providing various incentives. Pirelli provided written descriptions of the OPS plan to its salaried employees and required all salaried employees to attend one of several mandatory meetings. Pirelli corporate headquarters also provided information about the OPS plan for Pirelli's plant managers to disseminate to salaried employees at these meetings. The information included a script for the plant manager to read to the salaried employees at the group meetings, a slide presentation and a recorded audio presentation. At these meetings, Charles Wright, the plant manager, read the scripted presentation, while Shirley Pike, the Assistant Employee Relations Manager, and a human resources liaison since 1987, made a slide presentation and a recorded audio presentation, and answered employees' questions. Salaried employees were told in the script read by plant manager Wright that "[o]ur plan affords many of you the opportunity to act now to obtain a $100/$200 deductible during retirement and not be affected by the upcoming changes in retirement insurance." (J.A. at 108.) Wright testified that he told the salaried employees that their medical benefits would not change during their retirement. Employees also received a copy of a letter from Paul C. James, Pirelli's President, and a written description of the OPS plan. These materials informed the employees that early retirees would receive the benefit of the lowest deductible ($100/$200) and maximum out-of-pocket expense amounts ($300/$400) available for salaried employees, that they would receive these reduced deductibles and maximum out- of-pocket expenses "during retirement," and that they would not be affected by the upcoming changes in retirement insurance. Employees were generally told to bring any questions they might have to Pike, and many of them did just that.

In answering employees' questions, Pike consulted the company's current SPD and personnel policy directive book, and if those sources did not provide an answer, she would call corporate headquarters for assistance. Pike testified that her actions were in conformity with the procedures established by Armstrong and Pirelli. However, Pike admitted that she did not have the OPS plan documents in her Nashville office—in fact, she had never seen or read them during her employment with Armstrong and Pirelli. According to Pike, the OPS plan documents were in the corporate office in New Haven, Connecticut and were not available for examination in the Employee Relations Department in Nashville.

When employees who were at meetings with Pike asked her how long their benefits would last, she would tell them: during retirement. In her testimony, Pike defined "retirement" to mean during their lifetimes and the lives of their spouses unless the latter remarried. (J.A. at 350.) Pike also informed employees that their benefits would remain unchanged during their lifetimes. When employees asked Pike about language in the SPD that allowed the company to alter or amend the plan, Pike stated that it was written for the benefit of Pirelli to enable the company to change insurance carriers. As Pike put it, "If I had that discussion, I am sure I would have talked about insurance carrier." (J.A. at 354-55.) Although Pike could not remember if anyone from corporate headquarters inquired to determine whether she was disseminating accurate information, she admitted that no one from the company told her that her statement that medical benefits would remain unchanged during their lifetimes and that of their spouses unless they remarried was inaccurate because Pirelli reserved the right to change the OPS plan. Pike also admitted that she did not know whether she had the role of a fiduciary relating to the dissemination of information about the OPS plan to the company's employees because she was not sure what a "fiduciary" is. Pike added that to the best of her knowledge, the company provided her with truthful

and accurate information to present to the employees and the plan beneficiaries, and that the company advised her to answer questions posed by employees about the benefits so as not to mislead them. In any event, Pike testified that she did not intentionally mislead any employees with the information that she provided to them.

However, as acknowledged by Pirelli's General Counsel and Secretary, Sherwood Willard, it would have been prudent for Pike to have read the OPS Plan and to have had a copy of it in her office because she was responsible for providing accurate information to employees about the terms and conditions thereof. Willard also admitted that if Pike told employees that the company could not change their benefits during retirement, then she was not providing accurate information. Willard further acknowledged that if Pike told employees that the language in the SPD concerning the company's right to alter or amend the OPS Plan meant that the company could change insurance carriers, then that information was also incorrect.

In January of 1993, Pirelli adopted a new health care plan setting forth the terms of its medical benefit plan for salaried employees and retirees. Subsequently, in February of 1993, all retired salaried employees received a letter advising them that Pirelli had unilaterally changed the terms of their health insurance benefits. As stated in the written stipulation of facts, Plaintiffs incurred greater out-of-pocket expenses for health care under Pirelli's 1993 plan than they would have incurred if their medical benefits had not changed. In 1994, Pirelli again revised its medical benefit plan, increasing premium contributions, deductibles and maximum out-of-pocket amounts for Plaintiffs in 1995 and 1996.

As Pirelli points out, Plaintiffs fall into four distinct groups based upon when they retired. Five Plaintiffs retired in 1986 or 1987 before Pirelli acquired the Madison plant. Those Plaintiffs are Dewey Meador, Donald Rosso, Bobby

Richardson, Roy Kemp and Vada Haston. A second group consists of Plaintiffs who retired in 1990 before the announcement of the OPS program in July 1990. These Plaintiffs are Joe Smith, Paul Skelley, Jr., and Doyle Denton. A third group of Plaintiffs retired in 1990 and 1991 under the OPS program. These Plaintiffs are Clay James, Ernest Custer, John G. Carney, Dean Carney, Ruby Panzera, Andrew Panzera, Billy Fykes, B.L. Cook and Robert Adkins. The final Plaintiff is James Wallace, who retired in 1992.

At the bench trial, Plaintiffs provided testimony about the information supplied to them at the meetings when Pirelli induced them to take early retirement or resign. Clay James, who accepted early retirement on September 28, 1990 at age 58, testified that after attending mandatory meetings about the OPS plan with other employees in the summer of 1990, he met privately with Pike to talk about his pension options. According to James, Pike told him "an insurance change . . . . will affect you if you stay here as an employee," but that he had "an opportunity to lock in on the benefits as of today regardless even if you retire and work on into 1991." Specifically, Pike told James that he would get the benefits of "a hundred/200 dollars deductible, 300/400 dollars max . . . ." (J.A. at 213-14.)

Vada Haston testified that she was offered early retirement as part of Armstrong's reduction in force program in 1986. Before accepting early retirement on May 1, 1986, Haston met with Pike who assured her that if she took early retirement, she and her husband would receive all the medical benefits that they had while she was employed, except for dental and eye care. According to Haston, Pike told her benefits would be "[f]or as long as I lived" or "for life," and that "in the case of my husband, if he should outlive me, until his death, unless he remarried." Haston testified that Pike also advised her that her husband should drop other coverage that he had; when Haston asked "over and over again if he

would be covered," Pike told her that "he would be . . . for life." (J.A. at 845-46.)

Don Rosso, who retired in June of 1987 at the age of 51, also testified that he relied upon representations that Wright and Pike made during both group meetings and private interviews in opting for early retirement by bridging three years of service. According to Rosso, Wright assured him at the group meeting that he would "get to keep [his medical benefits] for the rest of [his] life." (J.A. at 230-31.) Afterwards, Rosso met privately with Pike and asked her about medical benefits he and his wife would get upon retirement. Pike told Rosso that he would get medical benefits "at no cost" and that his wife would not lose the benefits "unless she divorced . . . or remarried." (J.A. at 232-33.)

Bobby Richardson also retired in June of 1987 at age 53. Before retiring, Richardson went with Roy Kemp to meet with Pike to discuss early retirement. Richardson testified about the meeting with Pike as follows:

> Since I had the number of the bridge that they offered me was not enough to get me to 30 years, it only got me to age 55 which left me with my pension being reduced to at least 50 percent or better, which was not much of an incentive. The only thing that was an incentive was the fact that the insurance was—the insurance coverage was better than what I had then and that my concern was with my wife who is a very—comes from a very long-lived family, and I was very concerned about providing for her after my death and made sure that this in fact did that. And [Pike] assured me that it did and so I talked to my wife that night about it and decided to accept it based on that basis even though the financial loss of my pension was bad.

(J.A. at 239.) Richardson testified that the retirement form signed by him provided: "Upon retirement you will have the

following benefits at no cost to you . . . . [Your benefits] [r]emain[ ] the same except your deductible will be decreased to a hundred dollars individual, 200 family and maximum out-of-pocket expense will be 300 individual, 400 family, effective 9-1-88." At the time Richardson retired, he did not have a "deductible of 100/200," and he had a "1200 maximum out-of-pocket expenses for me and my wife." According to Richardson, Pike assured him that after his death the same benefits would remain in effect for his wife.

Roy Kemp, who also retired in 1987 at the age of 53 under the same bridging program as Richardson and Rosso, testified that at the meeting that he and Richardson attended with Pike, she stated that "I would receive my insurance for me and my wife at no cost to me for a lifetime," except for dental and vision coverage. (J.A. at 244.)

Ruby and Andrew Panzera, who are husband and wife, retired under the July 1990 OPS program after having two individual meetings with Pike. When Mr. Panzera asked Pike if the company could change their health insurance benefits after they retired, Pike answered that "it would not change" and "would remain this way until our death." (J.A. at 255-56.) Mrs. Panzera also testified that Pike told her that she would have prescription drug coverage "for life" and that the company would pay for all of it. (J.A. at 260.)

Emery Paul Skelley, Jr., who retired in June of 1990 at the age of 51, testified that Pike told him that, upon retirement, he would lose his vision and dental coverage, but would keep his prescription drug and medical coverage as well as his retirement benefits for the rest of his life. According to Skelley, he asked Pike whether there was "anything in small print anywhere else in any kind of contract that I lose any of this after I become 65" and whether he kept the benefits coverage "until the day I die." Skelley testified that Pike replied by telling him that "I would until the day I die."

(J.A. at 268.) Relying upon Pike's representation, Skelley decided to take early retirement.

B.L. Cook, who retired under the OPS program in July of 1990 at the age of 60, testified that after the group meeting conducted by Wright and Pike, he also met privately with Pike, who assured him that he would receive medical benefits, including prescription drug benefits, "for as long as I live and if I died before my wife then she would receive those benefits as long as she lived providing that she didn't remarry." (J.A. at 280-83.)

Ernest E. Custer, who retired in October of 1990 at the age of 46, testified that after the July 1990 meetings conducted by Wright and Pike, he spoke with Pike, who told him that if he retired under the OPS program, he would keep "the 100/200 deductible and the 300/400 maximum out-of-pocket" for his entire retirement. (J.A. at 222-23.)

Joe Smith, who retired on March 1, 1990 at the age of 60, attended a meeting in December of 1989 in which Pike told him and other employees that if they were going to retire, it would be advisable to do so in 1990 because the company was changing its insurance coverage. Smith also met separately with Pike, who told him that "she thought there was a change coming and if you was [sic] going to retire, 1990 would be the time to get out." (J.A. at 247.)

Doyle Denton, who retired in April of 1990 at the age of 63, also attended a meeting in December of 1989 in which Pike advised employees that it would be to their advantage to retire in 1990 because there was going to be a change in medical coverage, effective January 1, 1991. Denton also met separately with Pike, who told him that his medical benefits "were locked in for life" and "wouldn't cost my wife and myself anything," and that, upon retirement, his deductible "would actually decrease down to 100/200 dollars." (J.A. at 273.)

Billy Fykes retired on October 1, 1990 at age 57 under the OPS program of July of 1990. Fykes testified that at the meeting conducted by Wright and Pike in July of 1990, Pike stated that those taking early retirement would receive a 100/200 deductible and "would not be affected by the upcoming changes." (J.A. at 276-78.)

Robert D. Adkins retired in January of 1991 at the age of 57 under the OPS program. After attending the meeting in July of 1990 conducted by Wright and Pike, Adkins met separately with Pike who stated that his health insurance benefits would remain at the 100/200 deductible "[a]s long as I lived." Adkins understood that "I'd have this insurance the rest of my life." (J.A. at 286- 87.)

James Wallace, who retired on September 19, 1962 at the age of 60, testified that after attending a meeting in July of 1990 regarding the OPS program, he delayed his retirement because his department manager, who needed Wallace to continue working, advised him that he would be entitled to retire later with all the same benefits if he stayed. Before retiring, Wallace had a meeting with both Pike and Robert Mische, Pike's supervisor. According to Wallace:

> Well, we talked about what my benefits would be in retirement, and I was a little reluctant and the [sic] taking it. I was two years from drawing any Social Security so I didn't know if I could live on what I was going to get. But then in talking with them they assured me that I would have my life insurance and my drug card, my insurance. And Mr. Mische himself said it would be for the rest of my life and he wished at that point that he could get in the same position, and Shirley concurred that she would be in that position. And the fact that two years had transpired since I had talked to them before and decided it was time to go.

(J.A. at 297.)

John and Dean Carney are husband and wife, both of whom retired on October 1, 1990, at ages 52 and 57, respectively. After attending the meetings presenting the OPS program, the Carneys testified that they accepted the OPS program and early retirement because "[w]e were told that [our health insurance benefits] would be locked in and would not change." John Carney testified that he and his wife also had a private meeting with Pike, who assured them that all their medical benefits "would be locked in as they were and would not change if we took this program." (J.A. at 224-25.)

Dewey L. Meador retired on May 1, 1986, at the age of 57. At a meeting with Pike before retiring, Meador was told that "I would retain my same benefits I retired with for the rest of my life and my wife would also." Meador testified that Pike did not tell him that the company could change his health insurance benefits at a later date. (J.A. at 228.)

Following a bench trial, the district court, applying the principles set forth in *Varity Corp. v. Howe,* 516 U.S. 489, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996), *Sprague v. General Motors Corp.,* 133 F.3d 388 (6th Cir.1998) (*en banc*), and *Krohn v. Huron Memorial Hospital,* 173 F.3d 542 (6th Cir.1999), issued a decision on January 12, 2000 ruling that Pirelli breached its fiduciary duty only with regard to the two retired salaried employees who are not appellants here, Jack Jarrard and Ron Fitzsimmons. Specifically, the district court found that under *Krohn,* Jarrard and Fitzsimmons were entitled to damages from Pirelli because the company breached its fiduciary duties to them by providing inaccurate and misleading responses to their direct questions regarding ERISA plan benefits as part of early retirement incentive programs. However, as to Plaintiffs, the district court found that Pirelli did not breach its fiduciary duties to them because there was no evidence that Pike or Wright deliberately or negligently misled them in answering their direct questions,

or that Pirelli planned in advance to modify their retiree medical benefits years later.

Thereafter, Plaintiffs filed a motion seeking to amend and/or make additional findings of fact regarding the district court's January 12, 2000 order, claiming that the principles articulated in *Sprague* and *Krohn* required that the court's ruling with respect to Jarrard and Fitzsimmons be extended to them. The district court denied this motion on May 25, 2000. The parties then reached a settlement concerning damages owed to Jarrard and Fitzsimmons. The January 12, 2000 order and the May 25, 2000 order were both incorporated into a final judgment entered by the district court on October 19, 2000. It is this judgment from which Plaintiffs now appeal.

DISCUSSION

This Court reviews findings of fact following an ERISA bench trial for clear error. *Davies v. Centennial Life Ins. Co.*, 128 F.3d 934, 938 (6th Cir.1997). The district court's legal conclusions are reviewed *de novo. Id.*

I.

The issue on appeal is the district court's entry of judgment against Plaintiffs with regard to their ERISA breach of fiduciary duty claim.

Pursuant to § 1002(21)(A) of ERISA:

> [A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets . . . or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan."

29 U.S.C. § 1002(21)(A). ERISA also provides that "a fiduciary shall discharge his duties with respect to a plan

solely in the interest of the participants and beneficiaries." 29 U.S.C. § 1104(a)(1). As pointed out by this Court in *Krohn,* "ERISA imposes high standards of fiduciary duty upon administrators of an ERISA plan." 173 F.3d at 547. ERISA's fiduciary duty involves three components: (1) a duty of loyalty, requiring that "all decisions regarding an ERISA plan 'must be made with an eye single to the interests of the participants and beneficiaries;' "(2) a "prudent person fiduciary obligation," requiring that a plan fiduciary exercise his or her duties "with the care, skill, prudence, and diligence" of a prudent person acting under similar circumstances; and (3) a duty to act for the exclusive purpose of proving benefits to plan participants. *Id.* (quoting *Berlin v. Mich. Bell Tel. Co.,* 858 F.2d 1154, 1162 (6th Cir.1988)). ERISA therefore "imposes an unwavering duty on an ERISA trustee to make decisions with single-minded devotion to a plan's participants and beneficiaries and, in so doing, to act as a prudent person would act in a similar situation." *Berlin,* 858 F.2d at 1162. ERISA's fiduciary standards are derived from the common law of trusts "'bearing in mind the special nature and purpose of employee benefit plans.' "*Varity,* 516 U.S. at 506, 116 S.Ct. 1065 (quoting H.R. Conf. Rep. No. 93-1280, at 302).

A fiduciary breaches his duty by providing plan participants with materially misleading information, "regardless of whether the fiduciary's statements or omissions were made negligently or intentionally." *Krohn,* 173 F.3d at 547 (citing *Berlin,* 858 F.2d at 1163-64). "Misleading communications to plan participants 'regarding plan administration (for example, eligibility under a plan, the extent of benefits under a plan) will support a claim for a breach of fiduciary duty.' "*Drennan v. Gen. Motors Corp.,* 977 F.2d 246, 251 (6th Cir.1992) (quoting *Berlin,* 858 F.2d at 1163). "[A] misrepresentation is material if there is a substantial likelihood that it would mislead a reasonable employee in making an adequately informed decision in

pursuing disability benefits to which she may be entitled." *Krohn,* 173 F.3d at 547 (citing *In Re Unisys Corp. Retiree Med. Benefit "ERISA" Litig.,* 57 F.3d 1255, 1264 (3d Cir.1995)).

To establish a claim for breach of fiduciary duty based on alleged misrepresentations concerning coverage under an employee benefit plan, a plaintiff must show: (1) that the defendant was acting in a fiduciary capacity when it made the challenged representations; (2) that these constituted material misrepresentations; and (3) that the plaintiff relied on those misrepresentations to their detriment. *See Ballone v. Eastman Kodak Co.,* 109 F.3d 117, 122, 126 (2d Cir.1997); *Unisys,* 57 F.3d at 1266; *McMunn v. Pirelli Tire, LLC,* 161 F.Supp.2d 97, 120 (D.Conn.2001). "Whether an affirmative misrepresentation was 'material' is a 'mixed question of law and fact . . . .' [A] misrepresentation is material if there is a substantial likelihood that it would mislead a reasonable employee in making an adequately informed decision about if and when to retire." *Fischer v. Phila. Elec. Co.,* 994 F.2d 130, 135 (3d Cir.1993).

Plaintiffs in the matter at hand essentially argue that the district court applied the appropriate case law—namely, *Varity, Sprague* and *Krohn*—but applied it incorrectly. Consequently, Plaintiffs seek to have the district court's ruling in favor of Jarrard and Fitzsimmons expanded to encompass all Plaintiffs.

The Supreme Court held in *Varity* that an employer breached its fiduciary duty to former employees and retirees when it induced them to transfer their employment to a newly formed subsidiary that the employer knew was unstable. *See Varity Corp. v. Howe,* 516 U.S. at 505, 116 S.Ct. 1065. As the Court noted, "[t]he thrust of Varity's remarks [made at special meetings designed to persuade employees to transfer] . . . was that the employees' benefits would remain secure if they voluntarily transferred to [the subsidiary]." *Id.* at 494,

116 S.Ct. 1065. The Court further noted that "[a]s Varity knew, however, the reality was very different." *Id.* The Court therefore easily concluded that Varity had breached its fiduciary duty to the employees, uncontroversially finding that "[l]ying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in section 404(a)(1) of ERISA." *Id.* at 506, 116 S.Ct. 1065 (internal quotation omitted). Because the employer had deliberately misled its employees, the Court declined to "reach the question whether ERISA fiduciaries have any fiduciary duty to disclose truthful information on their own initiative, or in response to employee inquiries." *Id.*

In *Sprague,* this Court, sitting *en banc,* explicated the contours of an ERISA fiduciary's duty to disclose information to beneficiaries. Facing a factual scenario similar to the one involved in this case, *Sprague* considered whether General Motors ("GM") breached its fiduciary duties under ERISA by its oral and written representations to early retirees regarding its retirement program. *See* 133 F.3d at 393-94. In that case, GM, in an effort to avoid involuntary layoffs, tried to persuade employees to take early retirement. For more than two decades, GM had provided continuing health insurance benefits to salaried retirees. Although the plan documents and information booklets changed over the years, they all contained statements to the effect that basic health care coverage would be provided to retirees at GM's expense "for your lifetime." *Id.* Most of the booklets, however, also contained a reservation of rights clause, putting employees on notice that GM could amend, modify, suspend, or terminate its benefit plans at any time. *Id.* Early retirees were required to participate in an exit interview, at which many of the early retirees received plan documents, and some of the employees were orally put on notice of GM's right to amend or terminate the plan. *Id.* at 395. The "small number" of early retirees who asked specifically about future changes to health care benefits were accurately told that benefits could be changed

in the future. *Id.* In fact, as here, the plan was later modified in a way that adversely affected the retirees.

In addressing the plaintiffs' claims that GM breached its fiduciary duties by modifying the plan, this Court first noted that, although employers do not act in a fiduciary capacity when they amend or terminate a benefit plan, "'conveying information about the likely future of plan benefits' [is] a discretionary act of plan administration" giving rise to a fiduciary duty. *Id.* at 404-05 (quoting *Varity,* 516 U.S. at 504, 116 S.Ct. 1065). This Court held that, as a matter of law, GM had not breached this fiduciary duty, noting that "GM never told the early retirees that their health care benefits would be fully paid up or vested upon retirement. What GM told many of them, rather, was that their coverage was to be paid by GM for their lifetimes. This was undeniably true under the terms of GM's then-existing plan." *Id.* The Court added:

> Explanations of benefits
>
> "tend to sound promissory by their very nature. While these explanations may state a company's current intentions with respect to the plan, they cannot be expected to foreclose the possibility that changing financial conditions will require a company to modify welfare benefit plan provisions at some point in the future." [*Gable v. Sweetheart Cup Co.,* 35 F.3d 851, 857 (4th Cir.1994).]
>
> GM's failure, if it may properly be called such, amounted to this: the company did not tell the early retirees at every possible opportunity that which it had told them many times before—namely, that the terms of the plan were subject to change. There is, in our view, a world of difference between the employer's deliberate misleading of employees in *Varity Corp.* and GM's failure to begin every communication to plan participants with a caveat.

Id.

The employees in *Sprague* had received prior warnings about the company's right to amend or terminate the plan. In fact, some employees were reminded of that fact during their exit interviews just prior to early retirement. However, the *Sprague* court did not find these previous warnings of the employer's right to modify the plan determinative. Rather, this Court noted that ERISA contains detailed disclosure provisions regulating the contents of summary plan descriptions. *Id.* (citing 29 U.S.C. § 1022(b); 29 C.F.R. § 2520.102-3). Under these provisions, an ERISA fiduciary need not disclose its reservation of the right to amend or modify benefits in plan documents. *Id.; see also Adams v. Avondale Indus., Inc.*, 905 F.2d 943, 949 (6th Cir.1990). We then noted that no court of appeals has imposed fiduciary liability for a failure to disclose information that is not required to be disclosed, and that at least three circuits have held that there is no fiduciary duty to disclose planned changes in benefits or even a planned termination of the plan before those actions become official. *Id.* at 406 (citing *Pocchia v. NYNEX Corp.*, 81 F.3d 275, 278 (2d Cir.1996); *Payonk v. HMW Indus., Inc.*, 883 F.2d 221, 229 (3d Cir.1989); *Stanton v. Gulf Oil Corp.*, 792 F.2d 432, 435 (4th Cir.1986)). This Court therefore concluded that "there can be no fiduciary duty to disclose the *possibility* of a future change in benefits." *Id.*

Pirelli's liability to Jarrard and Fitzsimmons, which Plaintiffs wish to have extended to themselves, stems from the last paragraph of the *Sprague* court's analysis of the fiduciary duty issue, wherein this Court stated:

> Had an early retiree asked about the possibility of the plan changing, and had he received a misleading answer, or had GM on its own initiative provided misleading information about the future of the plan, or had GM been required by ERISA or its implementing regulations to forecast the future, a different case would have been

> presented. But we do not think that GM's accurate representations of its current program can reasonably be deemed misleading. GM having given out no inaccurate information, there was no breach of fiduciary duty.

Id.

Following the bench trial in the matter at hand, the district court concluded that *Sprague* shielded Pirelli from liability as to Plaintiffs, but not as to Fitzsimmons and Jarrard, because the latter two had posed direct questions to Pirelli's contact person, Pike, about the reservation of rights clause in the plan documents, asking what effect the clause might have on their future benefits. In response, Pike told the employees not to worry about that provision and inaccurately explained that the language only meant that the employer could change insurance carriers. Although there was no evidence that Pike deliberately misled Jarrard and Fitzsimmons, the district court held that her negligently rendered misleading responses to direct questions about the effect of the reservation of rights clause on future benefits gave rise to fiduciary liability under *Krohn.*

In *Krohn,* this Court held that a plan administrator breached its fiduciary duty to a participant by not providing complete and accurate information in response to the participant's questions about available benefits. The participant was an employee who had been in a car accident. *Krohn,* 173 F.3d at 545. At the time of her accident, Krohn was eligible for both short-term and long-term disability benefits. The short-term benefits were available on the fifteenth day of an injury up to a maximum of $200 per week, for up to twenty-six weeks. The long-term benefits were available on the 180th day of an injury up to a maximum of $3000 per month, until age sixty-five (twenty-three years in Krohn's case). When asked about what benefits would be available to Krohn, however, a personnel assistant responded only that short- term disability was available and that most

employees involved in automobile accidents found it advantageous to take short-term disability and recover under their automobile insurance for lost wages. *Id.* at 546. Krohn elected this option. Three years later, her benefits under her auto insurance expired, and she applied for long-term disability benefits under the plan. Under the terms of the policy, however, Krohn had been obligated to give notice within thirty days of the accident of her intent to apply for long-term benefits, and her application was denied as untimely. *Id.*

We then held as follows:

> Our review of the record thus reveals that [the fiduciary] received notice repeatedly that the plaintiff would be eligible for and would need long-term disability benefits. Furthermore, [the fiduciary] knew that in order to secure her right to long-term disability benefits, Krohn was required by the UNUM policy to submit a claim within 30 days of the occurrence of a loss covered by its policy, or as soon thereafter as is reasonably possible, and to provide proof of disability within 90 days of September 17, 1992, the date on which the 180-day elimination period ended. A prudent fiduciary acting in the best interest of its beneficiary would have advised Krohn that failure to submit a claim and proof of loss to UNUM in a timely fashion would render her ineligible to receive long-term disability benefits.

Krohn, 173 F.3d at 549-50.

In reaching this conclusion, we noted that "a fiduciary breache[s] its duties by materially misleading plan participants, regardless of whether the fiduciary's statements or omissions were made negligently or intentionally." *Id.* at 547 (citing *Berlin,* 858 F.2d at 1163-64). Furthermore, the Court approved of cases from other circuits holding that "once an ERISA beneficiary has requested information from an ERISA fiduciary who is aware of the beneficiary's status

and situation, the fiduciary has an obligation to convey complete and accurate information material to the beneficiary's circumstance, *even if that requires conveying information about which the beneficiary did not specifically inquire.*" *Id.* (emphasis added; citations omitted). The Court agreed with other circuits that "the 'duty to inform is a constant thread in the relationship between beneficiary and trustee; it entails not only a negative duty not to misinform, but also an affirmative duty to inform when the trustee knows that silence might be harmful.' "*Id.* at 548 (quoting *Bixler v. Cent. Pa. Teamsters Health & Welfare Fund,* 12 F.3d 1292, 1300 (3d Cir.1993)). We therefore held that the fiduciary breached its duty on the basis of its negligent omission, that is, by failing to inform Krohn about her eligibility for long-term benefits after Krohn inquired generally about what benefits were available, despite the fact that Krohn did not specifically ask about long-term benefits. *Id.* at 549.

Relying on *Krohn,* Plaintiffs suggest that Pirelli breached its fiduciary duty by not responding completely and accurately to Plaintiffs' questions about their health benefits, particularly about whether those benefits would continue during retirement. They argue that ten Plaintiffs—Clay James, Vada Haston, Don Rosso, Bobby Richardson, Roy Kemp, Andrew and Ruby Panzera, Paul Skelley, B.L. Cook, and Ernest Custer—all testified that they, like Jarrard and Fitzsimmons, addressed direct questions to Pirelli's representatives, primarily Pike, and received misleading information in response. They further argue that all other Plaintiffs should recover too, despite never asking specific questions, because they were also provided with inaccurate, incomplete, and misleading information.

The district court found that Fitzsimmons asked about the reservation of rights after reading about it in an article and that Jarrard asked about it after reviewing his handbook. Both men were inaccurately told that they should not worry

about the reservation of right, because it only gave the company the right to change insurance carriers. The district court was correct to conclude that, under *Krohn,* Pirelli was under a fiduciary obligation to provide complete and accurate answers to Fitzsimmons's and Jarrard's questions about the reservation of rights provision, and that it failed to do so. The district court also found that no plaintiff presented evidence that Pirelli deliberately misled employees or retirees, and that any statements by Pirelli suggesting that retirees' benefits would continue "for life" were true under the plan as it existed at that time and as it had existed since 1969. Furthermore, the court found (and Plaintiffs admitted) that there was no evidence suggesting that either Armstrong or Pirelli was planning to modify or terminate medical benefits in 1993.

II.

In determining whether Pirelli breached its fiduciary duty to Plaintiffs, we begin with an analysis of *Sprague,* where this Court stated:

> Had an early retiree asked about the possibility of the plan changing, and had he received a misleading answer, *or had GM on its own initiative provided misleading information about the future of the plan,* or had GM been required by ERISA or its implementing regulations to forecast the future, *a different case would have been presented.* But we do not think that GM's accurate representations of its current program can reasonably be deemed misleading. GM having given out no inaccurate information, there was no breach of fiduciary duty.

133 F.3d at 405-06 (emphasis added). As can be discerned, *Sprague* analyzes a possible breach of fiduciary duty in terms of three disjunctive conditions. A breach of fiduciary duty occurs if (1) an early retiree asks a plan provider about the possibility of the plan changing and receives a misleading or inaccurate answer or (2) a plan

provider *on its own initiative* provides misleading or inaccurate information about the future of the plan or (3) ERISA or its implementing regulations required the employer to forecast the future and the employer failed to do so.

While *Sprague* concluded that there was no breach of fiduciary duty because none of these conditions was met, *Krohn* found that the first condition was satisfied when the plan administrator breached its fiduciary duty by not providing complete and accurate information in response to the participant's questions about available benefits. However, neither case addressed the situation presented when an employer *on its own initiative* provides false and misleading information to employees about future benefits of a plan.

This factual scenario was presented in *Unisys* where the Third Circuit affirmed the district court's order finding that the plaintiffs could maintain a claim for breachof fiduciary duty under ERISA since "Unisys affirmatively and systematically represented to its employees that once they retired, their medical benefits would continue for life." *In re Unisys Corp.*, 57 F.3d at 1264. As the Third Circuit noted, "when a plan administrator affirmatively misrepresents the terms of a plan or fails to provide information when it knows that its failure to do so might cause harm, the plan administrator has breached its fiduciary duty to individual plan participants and beneficiaries." *Id.*

A similar situation was also addressed in *McMunn v. Pirelli Tire,* which dealt with whether Pirelli breached its fiduciary duty to its employees when it materially misled them about retirement medical benefits. 161 F.Supp.2d at 97. As in this case, Pirelli, as part of its plan to reduce its salaried workforce by about ten percent, offered the OPS plan in July of 1990 to induce voluntary retirement. Pirelli affirmatively represented to its employees that "the single/family deductible under the medical plan will be $100/$200 during

the individual's retirement." *Id.* at 108. Similar to this case, a Pirelli representative, in a prepared script, stated that one of the benefits of the OPS retirement plan was to allow retirees "the opportunity to act now to obtain a $100/200 deductible during retirement and not be affected by the upcoming changes in retirement insurance." *Id.* The principal focus of the dispute therefore was whether Pirelli's statements about the future benefits of the plan "constituted an affirmative misrepresentation by defendant that it would not exercise its right to alter or terminate these benefits during the retiree's lifetime and until the death or remarriage of his spouse, or was simply a description of the then-current policy and intention, which as a matter of law could be changed at a later date absent vesting language." *Id.* at 123.

The district court noted in *McMunn* that while "any employees who were expressly told by a person acting in a fiduciary capacity that their retirement benefits could not be changed during retirement received affirmative misrepresentations," there was no material misrepresentation when a fiduciary made "the simple statement" that "benefits 'will continue in retirement' without any durational limit." *McMunn*, 161 F.Supp.2d at 123. The court nonetheless recognized that a more troublesome question was presented by "the alleged representations by Armstrong/Pirelli that benefits would continue during retirement for the lifetime of the plaintiffs." *Id.* The district court noted that in *Unisys,* the Third Circuit ruled that the reservation of rights provision did not protect an employer from liability for a breach of fiduciary duty "where a company has deliberately fostered the belief that retirement benefits are lifetime benefits, and is aware that its employees incorrectly--if understandably--believe that their medical benefits will continue unchanged for the duration of their retirement." *Id.* at 124 (citing *Unisys,* 57 F.3d at 1265 n. 15). Thus, relying upon *Unisys,* the district court in *McMunn* found that "by continuing to assure plaintiffs that they would receive the same benefits in

retirement until their death without reference to the reservation of rights, defendant failed to convey complete and accurate information, and instead provided materially misleading information," upon which three of the plaintiffs detrimentally relied. *Id.* Accordingly, the district court in *McMunn* held that Pirelli breached its fiduciary duty to these plaintiffs when it materially misled them by "deliberately foster[ing] the belief that retirement benefits are lifetime benefits." *Id.*

Turning back to *Sprague,* although we found that there was no breach of fiduciary duty where GM had issued booklets containing a reservation of rights clause, *Sprague* does not stand for the proposition that a reservation of rights provision in a SPD necessarily insulates an employer from its fiduciary duty to provide "complete and accurate information" when that employer *on its own initiative* provides inaccurate and misleading information about the future benefits of a plan. Indeed, *Sprague* explicitly allows for a breach of fiduciary duty claim under such a circumstance. Were it otherwise, an employer or plan administrator could provide, on its own initiative, false or inaccurate information about the future benefits of a plan without breaching its fiduciary duty under ERISA, simply because of the existence of a reservation of rights provision in the plan. However, this would be contrary to the basic concept of a fiduciary duty, which "entails not only a negative duty not to misinform, but also an affirmative duty to inform when the trustee knows that silence might be harmful." *Krohn,* 173 F.3d at 548; *see also Mullins v. Pfizer, Inc.,* 23 F.3d 663, 668 (2d Cir.1994) (noting that "when a plan administrator speaks, it must speak truthfully").

Thus, with respect to the situation presented when an employer on its own initiative disseminates false and misleading information about a benefit plan, the position of the Sixth Circuit is aligned with that of the Third Circuit in *Unisys.* As in *Unisys,* where the Third Circuit found that the

reservation of rights provision did not protect an employer from liability for a breach of fiduciary duty when the employer deliberately fostered the belief that retirement benefits are lifetime benefits, *Sprague* does not stand for the proposition that a reservation of rights provision insulates an employer from liability for a breach of its fiduciary duty under ERISA when the employer disseminates materially false or misleading information on its own initiative about the future benefits of a plan. In short, an employer or plan administrator fails to discharge its fiduciary duty to act solely in the interest of the plan participants and beneficiaries when it provides, on its own initiative, materially false or inaccurate information to employees about the future benefits of a plan. Under these circumstances, it is not necessary that employees ask specific questions about future benefits or that they take the affirmative step of asking questions about the plan to trigger the fiduciary duty. The breach of fiduciary duty occurs when the employer or plan administrator on its own initiative provides misleading information about the future benefits of a plan.

In the instant case, both conditions (1) and (2) outlined in *Sprague* are at issue. Condition (1) applies because some Plaintiffs specifically put questions to Pike of Pirelli about the plan, and received misleading and inaccurate answers to their inquiries. But condition (2) also applies because Pirelli on its own initiative provided, through its representatives in Madison, Tennessee, misleading or inaccurate information about the future benefits of the plan.

Here, the district court erred in finding that Pirelli did not breach its fiduciary duty as to all Plaintiffs. Pirelli's breach of its fiduciary duty occurred when the company provided, on its own initiative, materially misleading and inaccurate information about the plan benefits to Plaintiffs in group meetings and exit interviews. As already indicated, Pirelli's fiduciary duty to Plaintiffs was triggered even though not all

Plaintiffs asked specific questions about the future benefits of the plan. As the district court found, Pike, Pirelli's human resources representative at the plant in Madison, Tennessee, and Wright, the plant manager, provided inaccurate and misleading information to Plaintiffs about their retirement benefits during group meetings and exit interviews conducted in connection with Pirelli's effort to reduce its salaried workforce. Both Pike and Wright falsely informed the salaried employees, including Plaintiffs, that their medical benefits would not change during retirement. However, as recognized by Willard, Pirelli's General Counsel and Secretary, Pike provided inaccurate information when she indicated to employees that the company could not change their benefits during retirement. Thus, it is clear that Pirelli, on its own initiative, provided misleading and inaccurate information about the plan benefits to Plaintiffs. Further, the false and inaccurate information provided by Pike and Wright to Plaintiffs constituted material misrepresentations because there was a substantial likelihood that it would mislead a reasonable employee in making an adequately informed decision. *See McMunn,* 161 F.Supp.2d at 120. And Plaintiffs relied upon these materially misleading representations to their detriment in deciding to take early retirement. Thus, Plaintiffs established that Pirelli breached its fiduciary duty to them.

Alternatively, we also find that those Plaintiffs who specifically asked Pike about the future benefits of the plan, but received materially misleading, inaccurate or incomplete answers in response to their inquiries, established an independent ground for their breach of fiduciary duty claims. Specifically, we note that Plaintiffs Clay James, Vada Haston, Don Rosso, Bobby Richardson, Roy Kemp, Andrew and Ruby Panzera, Emery Paul Skelley, B.L. Cook, and Ernest Custer established their breach of fiduciary duty claims on this basis because they asked questions about the future benefits of the plan and received inaccurate answers to their

queries, or responses that were less than "complete and accurate information material to the beneficiary's circumstance." *Krohn,* 173 F.3d at 547.

CONCLUSION

Because Pirelli, on its own initiative, provided all Plaintiffs with materially misleading or inaccurate information about the future benefits of the plan and because Pirelli provided ten Plaintiffs with materially misleading or inaccurate information in response to their direct questions about the possibility of their benefits changing under the OPS plan, Plaintiffs thus established that Pirelli breached its fiduciary duty to them. We therefore REVERSE the district court as to all Plaintiffs and REMAND the case for further proceedings consistent with this opinion.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

[Filed Jan. 12, 2000]

No. 3-95-0421
JUDGE ECHOLS

CLAY K. JAMES, JACK JARRARD, JAMES E. WALLACE, DON ROSSO, BENNIE R. MARBERRY, MARIE E. TAYLOR, JOE H. SMITH, EMERY PAUL SHELLY, JR., LARRY A. ROBERTS, MARY LOUISE SETTLE, BOBBY E. RICHARDSON, DEWEY L. MEADOR, PAUL D. NOLEN, JOHN A. KIRKPATRICK, RON FITZSIMMONS, B.L. COOK, ROY KEMP, BILLY H. FYKES, DOYLE S. DENTON, JOHN G. CARNEY, DEAN B. CARNEY, ROBERT D. ADKINS, JOHN D. TAYLOR, ERNEST E. CUSTER, VADA D. HASTON, ANDREW PANZERA AND RUBY PANZERA,

Plaintiffs,

v.

PIRELLI ARMSTRONG TIRE CORPORATION,

Defendant.

MEMORANDUM

This is an action brought by Plaintiffs, twenty-seven former employees [1] of Defendant Pirelli Armstrong Tire Corporation ("Pirelli"), alleging that they are entitled to relief based on Defendant's violations of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001-1461. In Count I of their Fifth Amended Complaint ("Complaint"),

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[1] This Court has dismissed the claims of John D. Taylor, John A. Kirkpatrick, Larry A. Roberts, and Marie Taylor.

Plaintiffs claim that Defendant's decision to modify or terminate Plaintiffs' benefits is a breach of the benefits plan and a violation of ERISA. Count II alleges that Defendant breached fiduciary duties owed to Plaintiffs. Count III seeks declaratory judgment that Defendant must provide the benefits sought in this action. Count IV seeks relief based on a theory of equitable estoppel. In Count V Plaintiffs claim that Defendant failed to supply written information regarding benefit plans as required under federal law. Finally, Plaintiffs, in Count VI, contend that they are entitled to recovery on a breach of contract theory.

This Court in a prior Order granted Defendant's Motion to Dismiss and/or for Summary Judgment with respect to Count I as to all Plaintiffs, and Count V as to all Plaintiffs but Jack Jarrard. The Court denied Defendant's Motion with respect to Plaintiff's [sic] remaining claims. Subsequent to the decision of the United States Court of Appeals for the Sixth Circuit in *Sprague* v. *General Motors Corporation*, 133 F.3d 388 (6th Cir. 1998) (en banc), Defendant filed a Renewed Motion for Summary Judgment, which this Court granted as to Count IV only. Thus, the case proceeded to trial on Count II for breach of fiduciary duties, Count III seeking declaratory judgment of entitlement to benefits based on liability under any one of the other remaining counts, Count *VI* for breach of contract, and Count V for failure to provide information to Jack Jarrard alone. Plaintiffs continue to assert their claim for equitable estoppel, contending that this Court's summary judgment decision was not a final order and thus, could be reconsidered at any time prior to entry of a final judgment.

Plaintiffs claims were tried before this Court, without a jury, on April 26, 28, and 29, 1999. The Court bifurcated the trial in this action, with the initial phase limited to questions of liability only on the individual claims of the twenty-three remaining plaintiffs. Having considered the stipulations of the parties and all of the evidence introduced at trial, the

Court makes the following findings of fact and conclusions of law on the questions of liability in accordance with Rule 52 of the Federal Rules of Civil Procedure:

FINDINGS OF FACT

Pirelli is a Delaware corporation headquartered in New Haven, Connecticut, engaged in the production of tires at several manufacturing plants, and formerly operated a tire production plan in Madison, Tennessee. All of the Plaintiffs were salaried employees at the Madison plant. The Madison plant originally was owned by Gates Rubber Company ("Gates"). In 1973, the plant was purchased by Armstrong Rubber Company ("Armstrong").

A. *The Plan Documents*

Armstrong provided medical benefits for its salaried employees and retirees through group insurance contracts with Connecticut General Life Insurance Company, including the 1980 policy, the 1984 policy, and the 1988 policy. Under both Armstrong and Pirelli, the policies were kept at the corporate offices in New Haven, Connecticut.

In 1981, Armstrong gave each of its salaried employees a summary plan description ("SPD") which described their medical benefits. The 1980 policy gave Armstrong the right to discontinue the policy as of any premium due date by providing the insurance company with advance written notice. The policy also could be amended if approved by both Armstrong and the insurance company. The 1981 SPD included a provision notifying the employees that the medical benefits could be terminated by Armstrong. The 1984 policy had the same provisions as the 1980 policy with regard to cancellation and amendment. Armstrong did not issue a new SPD after the 1984 policy became effective. Another insurance contract became effective in 1988, which also allowed changes to the policy through signed amendments, as well as cancellation of the policy.

In 1988, Pirelli purchased the Armstrong Rubber Company. In 1989, the year after Pirelli acquired the Madison plant, Pirelli distributed a new SPD to its employees. Pirelli was the new policy holder in place of Armstrong. In the 1989 SPD, Pirelli reserved the right to modify or terminate the medical benefit plan at any time. The SPD was divided into sections. Under the section concerning the Comprehensive Medical Insurance Plan, the 1989 SPD provided:

D. WHEN YOUR COVERAGE ENDS

Please refer to Section L of the Handbook for details concerning termination of coverage under this Plan.

Likewise, in the section concerning the Prescription Drug Plan, the 1989 SPD provided,

C. WHEN COVERAGE ENDS

Please refer to Section L of the Handbook for details concerning the termination of your coverage in the event you cease to be an active employee. In certain circumstances you may be able to continue to have coverage and this is explained.

In December of 1989, Pirelli held a series of meetings with groups of salaried employees. During these meetings, employees were given the new SPD and encouraged to consider retirement during 1990 to avoid an anticipated increase in the cost of health insurance that was scheduled to go into effect in January of 1991. In July of 1990, Pirelli implemented its Optional Pension/Severance Plan ("OPS"), which provided incentives for retirement. All salaried employees at Pirelli were required to attend one of several mandatory meetings about the OPS program. At these meetings, the employees received a copy of a letter from the President of Pirelli and a description of the OPS program. In August 1990, a memorandum was mailed to all employees reminding them of the objectives of the OPS program. The

memorandum also stated that "employees involuntarily released after August 31, 1990, will not be eligible £or the enhanced severance pay, medical benefits treatment, and special retirement features."

When the 1989 SPD was distributed, Section L of the Handbook, entitled Termination of Benefits, was empty. Pirelli never issued any supplemental materials to be placed in Section L of the 1989 SPD. At the Madison plant, the 1989 SPD was only issued to active employees, not retirees. Thus, Ron Fitzsimmons, Dewey Meador, Vada Haston, Bobby Richardson, Roy Kemp, and Don Rosso, all of whom retired in 1986 and 1987, never received the 1989 SPD. Doyle Denton, who retired in 1990, only received the binder for the 1989 SPD; he never received any information to place inside his binder before his retirement. Nine of the plaintiffs retired early under the OPS program. Eight of them received a document at their exit interviews that described their medical coverage during retirement as being "$100/$200 deductible" and "$300/$400 maximum out of pocket." Prescription drug coverage during retirement was to remain the same.

Pirelli implemented its own self funded medical benefits plan for salaried employees in 1993, effective as of April 1. All salaried retirees received a letter in February of 1993, advising them of the change in terms to their health insurance benefits and inviting them to attend a meeting to explain the changes.

Beginning in 1969 and continuing until 1993, although changes were made from time to time in medical benefits for both active and retired salaried employees, neither Gates nor Armstrong nor Pirelli implemented changes in medical benefits that were adverse to those salaried employees who had already retired. Instead, until the changes in 1993 that gave rise to this action, the practice by Pirelli and its

predecessors at the Madison plant had been to maintain medical benefits for salaried retirees at the same level at which they retired or better without any adverse change.

B. *The Optional Pension/Severance Program*

Armstrong and Pirelli reduced salaried personnel employment at various locations in 1986, 1987, 1989, and 1990. Pirelli's Optional Pension/Severance ("OPS") program in July 1990 was designed to effect a voluntary staff reduction of salaried employees by providing various incentives. As explained above, Pirelli provided written descriptions of the OPS program to its salaried employees. In addition, corporate headquarters furnished information to Pirelli's plant managers for presentation of the OPS program to the salaried employees. That information consisted of a script for the plant manager to read to the salaried employees at group meetings, a slide presentation, and a recorded audio presentation. Charles Wright, who was at that time the manager of the Madison plant, read without deviation the script provided for presentation of the program to salaried employees, and Shirley Pike showed the slides and played the audio portion of the presentation.

The employees were told to see Ms. Pike if they had any questions. Ms. Pike worked with both hourly and salaried employees, helped with hiring, and supervised employee benefits. In answering employee questions, Ms. Pike consulted the current SPD and the personnel policy directive book. If those sources did not provide the answer, she called corporate headquarters. Ms. Pike never had the medical insurance Plan documents in her office during her employment with Armstrong and Pirelli, and never saw or read the Plan itself. She did not know whether the Plan was consistent with the corresponding SPD. Ms. Pike testified that her actions complied with the procedure set forth by Armstrong and Pirelli.

Ms. Pike met with all salaried employees before their retirement. When Plaintiffs asked how long their benefits lasted, Ms. Pike told them "during retirement." She defined "during retirement" as during their lifetimes and the lives of their spouses unless they remarried. When two of the Plaintiffs asked her about language in the 1989 SPD that allowed the company to alter or amend the benefits, Ms. Pike told them that the language allowed the company to change insurance carriers.

When Pirelli's OPS program was announced in July 1990, it was made available as an incentive for eligible employees to retire or resign. Three categories of employees could avail themselves of various incentives under OPS. Under Option I, those employees who were already eligible to retire with an unreduced pension would receive, in addition to the normal pension, normal retiree medical benefits, and normal retiree life insurance, enhanced benefits in the form of extended vision and dental coverage for ninety days, and severance pay of one week per year of service. Under Option II, those employees who needed either five years or less of service or five years or less of age to become eligible for an unreduced pension would have their services or ages "bridged." As a result, instead of a reduced pension, those employees could proceed to retire early with the enhanced benefits of an unreduced pension, as well as extended vision and dental coverage for ninety days after they retired, in addition to normal retiree medical benefits and retiree life insurance. Under Option III, those employees who could not meet the requirements for a full pension or for a bridged unreduced pension could retire with a reduced pension and receive, in addition to normal retiree medical and life insurance, enhanced benefits in the form of severance pay of two weeks for each year of service and extended vision and dental coverage for ninety days. Also under Option III, those employees who were not yet eligible to receive a reduced

pension could voluntarily separate from service and receive enhanced benefits in the form of extended company paid benefits and severance pay of two weeks per year of service.

At the time of the announcement of the OPS program in July 1990, deductibles and maximum out-of-pocket costs under the Pirelli medical benefit plan for salaried employees was determined by the individual salaries of the employees. The lowest-paid salaried employees received the lowest deductibles and out-of-pocket maximums, while higher-paid employees incurred higher deductibles and out-of-pocket maximums. Until 1991, a salaried employee who retired continued to receive the same medical benefits, but with the deductible and out-of-pocket maximums reduced to the lowest level then in effect for active employees. Beginning in January 1991, however, the practice of reducing a salaried employee's deductibles and out-of-pocket maximums upon retirement to the lowest available level was changed. Those salaried employees who retired after January 1, 1991, continued as retirees to bear the same deductibles and out-of-pocket maximums as they had as active employees, rather than having their deductibles and out-of-pocket maximums reduced to the lowest available levels in effect at the time of retirement.

The written description given to the salaried employees to explain the OPS program contained a section describing "special group insurance coverages." As that section made clear, the medical and prescription drug benefits under OPS were the normal medical and prescription drug benefits. The enhanced benefit coverages were dental and vision care coverages for ninety days beyond the retirement date. The written description of the OPS program, as well as the slide presentation, showed that the deductibles and out-of-pocket maximums under the medical benefits plan available to retirees who accepted the OPS program were not an enhanced

benefit, but were the same deductibles and out-of-pocket maximums that retirees in 1990 otherwise would have received.

C. *New Medical Benefits Plan*

In January 1993, Pirelli adopted a newly-drafted health care plan setting forth the terms of its new medical benefits plan for salaried employees and retirees. In February 1993, all salaried retirees received information inviting them to attend a series of meetings during which changes in their medical benefits would be explained. Plaintiffs contend that under Pirelli's new plan they have incurred higher out-of-pocket costs for health care than they would have incurred if their medical benefits had not been changed in 1993. Pirelli implemented a revised version of its plan in 1994. Premium contributions, deductibles, and maximum out-of-pocket amounts for Plaintiffs increased in 1995 and 1996.

D. *Plaintiffs' Accounts*

The twenty-three plaintiffs may be divided into five categories:

(i) six of the plaintiffs retired in 1986 or 1987, before Pirelli acquired the Madison plant: (1) Dewey Meadow; (2) Ron Fitzsimmons; (3) Donald Rosso; (4) Bobby Richardson; (5) Lee Roy Kemp; and (6) Vada Haston;

(ii) four of the plaintiffs retired in 1990 prior to the announcement of the OPS program in July 1990: (1) Jack Jarrard; (2) Joe Smith; (3) Paul Skelly, Jr.; and (4) Doyle Denton;

(iii) nine of the plaintiffs retired in 1990 or 1991 under the OPS program: (1) Clay James; (2) Ernest Custer; (3) John G. Carney; (4) Dean Carney; (5) Ruby Panzera; (6) Andrew Panzera; (7) Billy Fykes; (8) B.L. Cook; and (9) Robert Atkins;

(iv) one of the plaintiffs, James Wallace, retired in 1992; and

(v) three of the plaintiffs did not retire, but ceased working due to disabilities: (1) Bennie Marberry; (2) Paul D. Nolen; and (3) Mary Louise Settle.

(i). *1986 and 1987 Retirees*

Mr. Meador, Mr. Fitzsimmons, Mr. Richardson, Mr. Kemp, and Ms. Vaston were told by Ms. Pike that they and/or their spouses would retain their medical benefits for life. Mr. Rosso was told by Charles Wright that he and his spouse would retain his benefits for life. None of the 1986 and 1987 retirees have any information that Ms. Pike or Mr. Wright deliberately misled them or that Armstrong or Pirelli planned in advance to modify their retiree medical benefits years later.

During a meeting with Ms. Pike, Mr. Fitzsimmons asked about the reservation of right to change benefits which he had seen in an "article." Ms. Pike told him "don't worry about that" and explained that the language allowed the company to change insurance carriers. Another Pirelli employee, Russ Weymouth, was standing in the doorway during this exchange. Mr. Fitzsimmons asked Mr. Weymouth if Ms. Pike was correct and Mr. Weymouth-agreed with Ms. Pike.

(ii). *Pre-OPS 1990 Retirees*

Mr. Jarrard, Mr. Skelly, and Mr. Denton were told by Ms. Pike that they and/or their spouses would retain their medical benefits for life. None of the Pre-OPS 1990 retirees have any information that Ms. Pike or Mr. Wright deliberately misled them or that Armstrong or Pirelli planned in advance to modify their retiree medical benefits years later. After reviewing his Salary Employees Benefit Handbook, Mr. Jarrard was concerned about the company's reservation of the right to change benefits and asked Ms. Pike for an explanation. Ms. Pike said that the language did not concern him

and that it gave the company the right to change insurance companies. She told him, "don't be concerned about that" and that the language was "for her benefit."

(iii). *1990-91 OPS Retirees*

Mr. James, Mr. Custer, Mr. Carney, Mrs. Carney, Mrs. Panzera, Mr. Panzera, Mr. Cook, and Mr. Adkins were told by Ms. Pike that they and/or their spouses would retain their medical benefits for life. None of the 1990-91 OPS retirees have any information that Ms. Pike or Mr. Wright deliberately misled them or that Armstrong or Pirelli planned in advance to modify their retiree medical benefits years later.

(iv). *1992 Retiree*

Mr. Wallace was told by Ms. Pike and her supervisor, John Mische, that he would retain his medical benefits for life. He has no information that Ms. Pike or Mr. Mische deliberately misled him or that Armstrong or Pirelli planned in advance to modify his retiree medical benefits years later.

(v). *Disability Cases*

Mr. Marberry, Mr. Nolen, and Ms. Settle did not retire, but ceased working due to disabilities. Mr. Nolen and Ms. Settle were assured by Ms. Pike that while they disabled [sic], their medical benefits would remain the same. None of the disabled former employees have any information that Ms. Pike deliberately misled them regarding the medical benefits they would receive.

E. *Plaintiffs' Theories*

Plaintiffs allege that Defendant breached its fiduciary duties as plan administrator by inducing Plaintiffs to retire early with representations that they would not be affected by upcoming changes in health insurance when Defendant knew that it could amend or terminate the plan at any time. Plaintiffs contend that the facts of the present action can be

distinguished from the facts of *Sprague* on which Defendant relies. In support of their contention, Plaintiffs assert that Defendant, in addition to failing to disclose its right to modify or terminate plan benefits, provided inaccurate and misleading responses to direct questions by Plaintiffs regarding the future benefits of the plan. Plaintiffs assert that Defendant's inaccurate responses, whether provided deliberately or negligently, constitute a breach of fiduciary duties by Defendant under the Sixth Circuit's recent decision in *Krohn v. Huron Memorial Hospital*, 173 F.3d 542 (6th Cir. 1999), wherein the court held: "[a] fiduciary breaches its duties by materially misleading plan participants, regardless of whether the fiduciary's statements or omissions were made negligently or intentionally." *Id.* at 547.

Plaintiffs also allege that they entered into bilateral contracts with Defendant for lifetime medical benefits, which the Defendant breached. Plaintiffs claim that Defendant's conduct was tantamount to fraud and thus supports a claim for breach of contract based on non-plan documents and communications.

At trial, Plaintiffs continued to assert their claim for equitable estoppel, contending that this Court's summary judgment decision was not a final order and thus, could be reconsidered at any time prior to entry of a final judgment. Plaintiffs disagree with the Court's earlier finding that the plan documents are unambiguous, asserting that the 1981. SPD contained an ambiguous reservation of the right to amend and the 1989 SPD referred employees to an empty Section L for information regarding when coverage would end. Thus, Plaintiffs maintain that principles of equitable estoppel should apply as Plaintiffs justifiably relied on Defendant's misrepresentations regarding whether upcoming changes in health insurance would affect early retirees.

Plaintiffs further maintain that Defendant is collaterally estopped from arguing that equitable estoppel does not apply

to this case based on Judge Nixon's decision in *United Rubber, Cork, Linoleum and Plastic Workers of Americans, et al. v. Pirelli Armstrong Tire Company, et al.*, 873 F. Supp. 1093 (M.D. Tenn. 1994). *United Rubber* is an action filed by hourly employees of Defendant, challenging its decision to terminate their retiree health benefits under a variety of theories, including equitable estoppel. After a bench trial, Judge Nixon ruled in favor of the plaintiffs. Plaintiffs in the present action contend that the elements of collateral estoppel have been met and Defendant should be collaterally estopped from relitigating the issue of equitable estoppel.

Finally, Plaintiff Jack Jarrard claims that Defendant failed to supply certain written information to him in violation of 29 U.S.C. § 1024(b) (4).

F. *Defendant's Theories*

With regard to Plaintiffs' breach of fiduciary duties claim, Defendant maintains that ERISA does not require disclosure by an employer that a benefit plan is subject to amendment or termination. Citing *Sprague*, Defendant contends that its statements that benefits are payable "for life," if true under the existing benefit plan terms, does not constitute a breach of fiduciary duty. Defendant further contends that in order for Plaintiffs to prevail under this theory, each Plaintiff must prove that Defendant deliberately misled or induced him or her to retire earlier than he or she otherwise would have retired, and he or she did in fact retire early in reliance on those deliberate misrepresentations. Defendant asserts that no evidence was presented at trial from which the Court could find that Defendant deliberately misled Plaintiffs.

With regard to Plaintiffs' breach of contract claim, Defendant asserts that the absence of any deliberate misrepresentation on the part of Defendant disposes of any possible fraud-based breach of contract claim. Defendant contends that the Sixth Circuit has consistently refused to recognize

oral modifications to written plan documents as well as employee "statements of acceptance" as modifications to the plan "absent a particularized showing of conduct tantamount to fraud." *Sprague*, 133 F.3d at 403.

With regard to Jack Jarrard's claim, Defendant points out that because Plaintiff offered no proof in support of his claim at trial, the Court must find in favor of Defendant.

CONCLUSIONS OF LAW

Plaintiffs' claims for relief present five primary issues to be resolved: (1) whether Defendant breached fiduciary duties owed to Plaintiffs; (2) whether Defendant breached bilateral contracts with Plaintiffs for lifetime medical benefits; (3) whether Defendant should be collaterally estopped from arguing that equitable estoppel does not apply to this case; (4) whether Defendant should be equitably estopped from enforcing the provisions of the 1993 and 1994 plans against Plaintiffs; and (5) whether Defendant failed to provide certain written information to Plaintiff Jack Jarrard.

1. *Breach of Fiduciary Duties*

Under ERISA, a "person is a fiduciary with respect to a plan," and therefore subject to ERISA fiduciary duties, "to the extent" that he or she "exercised any discretionary authority or discretionary responsibility in the administration of the plan." 29 U.S.C. § 1002(21) (A). As the Court noted in an earlier opinion, the parties apparently agree that Defendant acted in a fiduciary capacity when Defendant explained the benefits available under its health care plan to Plaintiffs. The parties continue to dispute, however, whether Defendant breached its fiduciary duties.

In *Varity Corporation v. Howe*, 516 U.S. 489 (1996), the employer created a new subsidiary to enable the parent to shed some of its debt, knowing that the subsidiary might well fail. The employer induced employees to transfer to the new

subsidiary with deliberately misleading assurances that the new subsidiary would be financially successful and that the employee benefits plan would be financially sound and would not change. The United States Supreme Court found that the employer's misrepresentations to the employees regarding the status of the plan amounted to a breach of fiduciary duty.

The Sixth Circuit in *Sprague v. General Motors Corporation*, 133 F.3d 388 (6th Cir. 1998) (en banc), recently addressed the application of the Supreme Court's holding in *Varity Corporation* to facts similar to those of the present case. The *Sprague* court noted that the defendant, General Motors ("GM"), had for more than two decades engaged in systematic reductions in the size of its salaried workforce. To assist in these reductions, GM launched a special early retirement program designed to induce salaried workers to retire before reaching normal retirement age. In the course of explaining these early retirement programs, GM made numerous oral and written representations regarding the health care benefits available to early retirees. Most early retirees participated in exit interviews during which a particular early retirement program was described. These interviews were conducted by plant supervisors, members of the benefits staff, and others. Many of the early retirees also received documents summarizing applicable retirement benefits which often informed retirees that their health insurance would be paid by GM for life. Such documents, however, sometimes put the retirees on notice of GM's right to change benefits, advising, for example, that "General Motors Corp. reserves the right to amend, change or terminate the Programs described." *Id.* at 395. A small number of early retirees expressly asked GM representatives about the possibility of future changes to health care benefits. The answers given, according to the Sixth Circuit, were accurate and acknowledged that benefits could be changed in the future. In late 1987, GM announced that early the following year significant changes would become effective in health care coverage for

both salaried employees and retirees. A class action lawsuit was filed shortly thereafter challenging the legality of these changes.

The Sixth Circuit found that GM's description of the benefits provided under its early retirement program did not breach any applicable fiduciary duty. Distinguishing the facts found in *Sprague* from those in *Varity Corporation*, the Sixth Circuit explained:

> *Varity Corp.* teaches that GM may have acted in a fiduciary capacity when it explained its retirement program to the early retirees. As a matter of law, however, we do not believe that GM committed a breach of any applicable fiduciary duty. In the first place, GM never told the early retirees that their health care benefits would be fully paid up or vested upon retirement. What GM told many of them, rather, was that their coverage was to be paid by GM for their lifetimes. This was undeniably true under the terms of GM's then-existing plan.
>
> Explanations of benefits tend to sound promissory by their very nature. While these explanations may state a company's current intentions with respect to the plan, they cannot be expected to foreclose the possibility that changing financial conditions will require a company to modify welfare benefit plan provisions at some point in the future. GM's failure, if it may properly be called such, amounted to this: the company did not tell the early retirees at every possible opportunity that which it had told them many times before—namely, that the terms of the plan were subject to change. There is, in our view, a world of difference between the employer's

> deliberate misleading of employees in *Varity Corp.* and GM's failure to begin every communication to plan participants with a caveat.

Sprague, 113 F.3d at 405 (footnote, internal quotation marks, and citation omitted).

In determining that GM had not breached its fiduciary duty, the Sixth Circuit stated that "[h]ad an early retiree asked about the possibility of the plan changing, and had he received a misleading answer, or had GM on its own initiative provided misleading information about the future of the plan . . . , a different case would have been presented." *Id.* at 406. Indeed, in a subsequent case, the court reiterated that a fiduciary must give complete and accurate information in response to beneficiaries' questions. *See Krohn*, 173 F.3d at 547. The court stated, "[a] fiduciary breaches its duties by materially misleading plan participants, regardless of whether the fiduciary's statements or omissions were made negligently or intentionally." *Id.* (citation omitted).

In the present case, like *Sprague*, Defendant's statements to Plaintiffs that they would retain their medical benefits "for life" were true under the terms of the then-existing plan. Plaintiffs offered no evidence that Ms. Pike, Charles Wright, or any other Armstrong or Pirelli official deliberately misled them regarding their retiree medical benefits. In fact, Plaintiffs acknowledged at trial that the statements that they would receive medical statements for life were consistent with what the successive employers' practices had been for many years prior to their retirement. Plaintiffs also acknowledged at trial that they had no information suggesting that, at the time each retired, Armstrong or Pirelli was planning to modify or terminate their retiree medical benefits in 1993. As the *Sprague* decision provides, Defendant was not required to repeatedly tell Plaintiffs that the plan was subject to change. Absent evidence of an improper motive for offering the early retirement option, an intent to later change the plan at the

time the OPS program was implemented, or any misleading statements by Defendant, Plaintiffs' breach of fiduciary duty claims fail.

However, the Court believes, with respect to Plaintiffs Fitzsimmons and Jarrard, that the present action can be distinguished from *Sprague*. In *Sprague*, an employer merely failed to disclose that it had reserved the right to amend its ERISA plan; however, in the present action, Defendant provided inaccurate and misleading responses to direct questions by Mr. Fitzsimmons and Mr. Jarrard regarding the future of the plan. When questioned, Ms. Pike instructed Mr. Fitzsimmons and Mr. Jarrard not to worry about the company's reservation of right to change benefits in their employee handbooks. Rather than explaining that the language gave Defendant the right to modify or terminate Plaintiffs' medical benefits, both Ms. Pike and Mr. Weymouth inaccurately told the two plaintiffs that the language allowed the company to change insurance carriers. Although there is no evidence that either Ms. Pike or Mr. Weymouth did so deliberately, under the Sixth Circuit's opinion in *Krohn*, their negligently-rendered misleading responses sustain Mr. Fitzsimmons' and Mr. Jarrard's breach of fiduciary duty claims. Accordingly, the Court finds in favor of Plaintiffs Fitzsimmons and Jarrard as to their breach of fiduciary duty claims.

2. *Breach of Contract*

In its Memorandum addressing Defendant's Motion for Summary Judgment, the Court, again relying on *Sprague*, held that Plaintiffs could assert at trial a cause of action for breach of contract based on non-plan documents *provided* Plaintiffs were able to make a particularized showing of conduct tantamount to fraud. *See Sprague*, 133 F.3d at 403 ("Altering a welfare plan on the basis of non-plan documents and communications, *absent a particularized showing of conduct tantamount to fraud*, would undermine ERISA.")

(emphasis added) (quoting *Moore*, 856 F.2d at 489)). To establish fraud, each plaintiff must show a false representation of a material fact made knowingly or recklessly upon which the plaintiff has reasonably relied to his detriment. *See Ockerman v. May Zima & Co.*, 27 F.3d 1151, 1156 n.5 (6th Cir. 1994).

As the Court concluded with respect to Plaintiffs' breach of fiduciary duty claim, to the extent that Ms. Pike described retiree benefits as being for life, she was accurately describing the terms of the then-existing retiree medical benefits plan. Ms. Pike's testimony at trial indicates that her statements with respect to the duration of benefits were not made with knowledge of their falsity or with recklessness:

Q. All right. And I understand you believe that to be the policy and an accurate statement of the policy that you provided to these individuals, right?
A. That's true.
Q. Excuse me?
A. Yes, sir.
Q. Okay. And did anyone Armstrong or Pirelli advise you that that was not the policy or the practice, at that time?
A. No, sir.
Q. You have later come to find out that that was inaccurate, haven't you?
A. Yes, sir.
Q. Yes?
A. Yes, sir.
Q. And I can tell by your response I know that's upsetting to you, isn't it, that what you told these people was inaccurate?
A. It wasn't inaccurate at that particular time to me. I told—
Q. To you?

A. Yeah, I told them at that time what I believed the plan was.

Trial Tr. pp. 388-389.

No other evidence was presented at trial indicating that Ms. Pike's representations were false, let alone made with the intent to deceive Plaintiffs. Likewise, no evidence was submitted indicating that Defendant intended in 1986, 1987, or 1990 to modify or terminate medical benefits for existing retirees in 1993.

To the extent that Ms. Pike provided inaccurate and misleading responses to Mr. Fitzsimmons and Mr. Jarrard's questions regarding Defendant's right to modify or terminate Plaintiffs' medical benefits, Ms. Pike's testimony at trial again indicates that her statements were not made with knowledge of their falsity or with recklessness:

Q. . . . And in fact, don't you remember people asking you with the language in the Summary Plan Description where it says "This plan can be altered or amended," that general language, you told people that that was for the benefit of the company so you could change insurance carriers, didn't you?

A. If I had that discussion, I am sure I would have talked about insurance carrier.

Q. Right. Now, whatever information you provided to [plaintiffs], did you believe it to be true at that time?

A. Yes, sir.

Q. You certainly wouldn't have provided any information that you thought was intentionally misleading, would you?

A. No, sir.

Trial Tr. pp. 396-97.

No other evidence was presented at trial indicating that Ms. Pike's representations made intentionally or recklessly. As a result, Plaintiffs' proof falls far short of making "a particularized showing of conduct tantamount to fraud" on the part of Defendant. Accordingly, the Court finds in favor of Defendant as to Plaintiffs' breach of contract claim.

3. *Collateral Estoppel*

Plaintiffs assert that Defendant should be collaterally estopped from relitigating the issue of equitable estoppel based on Judge Nixon's opinion in *United Rubber*, 873 F. Supp. 1093. In *United Rubber*, the plaintiffs, hourly employees for Pirelli (the same defendant as in this case), challenged the legality of Pirelli's decision to terminate retiree health benefits. In holding that the employees were entitled to continuation of their benefits, the court found that Pirelli did not have the right to terminate the retirees' benefits because it:

> has consistently told the retirees that their benefits were for life. Second, by unilaterally terminating the benefits of the retirees, the Court finds that [Pirelli] has shown that it has always believed that such benefits were not for life. Third, the Court finds that [Pirelli] has acknowledged that it used the benefits as an inducement to employment and as a substitute for present wages. Fourth, the Court finds that the retirees had no knowledge that [Pirelli] could terminate their benefits until they received [Pirelli's] letter of July 8, 1994. Finally, the Court finds that Plaintiff retirees relied upon the representations by working for [Pirelli], by foregoing present wages for future benefits, and by retiring and not making any other arrangements for health benefits. As the Court finds that all the factors have been met, the Court concludes that [Pirelli] is estopped from terminating Plaintiff retirees' benefits.

873 F. Supp. at 1102.

In order to apply collateral estoppel, four requirements must be met:

(1) the *precise issue* raised in the present case must have been raised and actually litigated in the prior proceeding;

(2) determination of the issue must have been necessary to the outcome of the prior proceeding;

(3) the prior proceeding must have resulted in a final judgment on the merits; and

(4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding.

NAACP v. Detroit Police Officers Ass'n, 821 F.2d 328, 330 (6th Cir. 1987) (footnote omitted) (emphasis added).

Plaintiffs and Defendant dispute whether the issue in *United Rubber* is identical to the issue before this Court. While the present dispute involves benefits available to salaried employees, in *United Rubber* the court considered whether Pirelli was required to continue benefits provided to hourly employees. As Judge Nixon's findings of fact in *United Rubber* reveal, hourly employees' retiree insurance benefits arose under collectively bargained Employee Benefits Agreements which constituted the welfare benefit plans for those hourly employees. The United Rubber, Cork, Linoleum and Plastic Workers of America ("URW"), an unincorporated labor organization, and its affiliated local unions served as the collective bargaining representatives of Pirelli's hourly employees, negotiating with Pirelli with regard to health care benefits provided by Pirelli for the hourly employees.

The issue in the present issue involves health benefits for individual *salaried* retirees who were subject to several medical benefit plans and who retired at different times.

Their benefits are not provided under the collectively bargained Employee Benefit Agreements entered into between Pirelli and the Union, but instead under separate benefit plans maintained by Pirelli from time to time for its salaried employees. Federal courts have fashioned a uniform body of federal law to govern the enforcement of collective bargaining agreements. The context in which Pirelli made representations to its hourly employees, whose benefits are governed by the collectively bargained agreements, is different than that in which Pirelli made representations to its salaried employees. While Pirelli may have made similar representations to both hourly and salaried employees regarding the duration of their benefits, the various plans are different and the consequences could be dissimilar due to the different law governing collective bargaining agreements under these circumstances. Thus, the Court finds that the first element necessary to sustain Plaintiffs' collateral estoppel claim, namely that the *precise issue* in the two cases be the same, was not established. Accordingly, the Court finds in favor of Defendant as to Plaintiffs' collateral estoppel claim.

4. *Equitable Estoppel*

As Plaintiffs contend, the Court's summary judgment decision dismissing Plaintiffs' equitable estoppel claim is not a final order and, thus, the Court may reconsider the claim at any time prior to entry of a final judgment. *See* Fed. R. Civ. P. 54; *Bennett v. Youker*, No. 86-1075, 1986 WL 16938, *1 (6th Cir. 1986) (holding that the district court's order summarily dismissing claims against defendants was not a final judgment).

The elements of an equitable estoppel claim are as follows:

> (1) there must be conduct or language amounting to a representation of material fact; (2) the party to be estopped must be aware of the true facts; (3) the party to be estopped must intend that the representation be acted

> on, or the party asserting the estoppel must reasonably believe that the party to be estopped so intends; (4) the party asserting the estoppel must be unaware of the true facts; and (5) the party asserting the estoppel must reasonably or justifiably rely on the representation to his detriment.

Sprague, 133 F.3d at 406 (citing *Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1298 (6th Cir. 1991)). Although equitable estoppel may be a viable claim in ERISA cases, the Sixth Circuit in *Sprague* limited application of the doctrine to those situations in which the terms of the plan documents are ambiguous. 133 F.3d at 404 ("Principles of estoppel . . . cannot be applied to vary the terms of unambiguous plan documents; estoppel can only be invoked in the context of ambiguous plan provisions.")

In an earlier Memorandum the Court found that Defendant expressly reserved the right in the plan documents themselves to modify the terms of the benefit plan under which the parties seek relief. (Docket Entry No. 93, at 7 n.7). Plaintiffs have conceded that the plan documents under which their claims to benefits arise contain unambiguous reservations by PATC of the right to modify or terminate the plans.[2] The Court reiterates that because "[p]rinciples of estoppel . . . cannot be applied to vary the terms of unambiguous plan documents," *id.* at 404, Plaintiffs' equitable estoppel claim must fail as a matter of law. *Sprague* mandates this outcome despite the fact that Defendant may have made oral and written statements contrary to the plan documents. *See id.* ("In the fact of GM's clearly stated right to amend—a right contained in the plan to which the plaintiffs had access and in many of the summaries they were given—reliance on statements allegedly suggesting the contrary was not, and

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[2] Plaintiffs' 8(b) Response No.1.

could not be, reasonable or justifiable . . . ."). Accordingly, the Court must find in favor of Defendant with regard to Plaintiffs' equitable estoppel claim.

5. *Failure to Provide Documents to Jack Jarrard*

Section 1024(b) (4) of ERISA provides that:

> The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated.

Section 1132 (c) of ERISA provides that an administrator who fails to comply with a request may be liable to a plan participant for up to $100.00 per day.

In a letter dated March 10, 1993, to Mr. Weymouth, Plaintiff Jarrard requested: (1) a copy of The Armstrong Tire Company's Severance Compensation Plan for Salaried Employees; (2) a copy of "each policy book that was issued by Armstrong since 1973"; (3) that retirees have access to read those documents at the Nashville Plant Labor Relations Office, and to obtain copies if necessary; and (4) a list of all Nashville salaried retirees, addresses, phone numbers, and dates of retirement. (Docket Entry No. 47, Ex. 8). Mr. Weymouth, then Vice President of Human Resources, responded by letter dated April 2, 1993, supplying Plaintiff Jarrard with a copy of the Severance Compensation Plan for Salaried Employees and the latest summary plan description. (Docket Entry No. 47, Ex. 9). Mr. Weymouth explained in his letter that Pirelli was under no obligation to provide Mr. Jarrard with the other documents he requested and that Pirelli considered Mr. Jarrard's requested list for names and

information about salaried employees to be confidential. (*Id.*) At trial, Plaintiff Jarrard offered no further proof in support of his claim against Defendant for failure to provide information.

The only information to which Mr. Jarrard or any other participant or beneficiary is entitled is the information specified in 29 U.S.C. § 1024(b) (4). The uncontradicted evidence shows that Defendant provided Mr. Jarrard with a copy of the Severance Compensation Plan for Salaried Employees which he requested. Defendant is required only to provide upon request those documents enumerated in § 1024 (b) (4). The other documents requested by Mr. Jarrard in his March 10, 1993, letter were not encompassed within the scope of those documents Defendant was required to supply under § 1024(b) (4).

In addition, there is no general requirement in § 1024(b) (4) that the plan administrator make available to all retirees access to and copies of whatever documents they may wish to review. Indeed, 29 U.S.C. § 1132(b) (2) only applies to an administrator who fails to comply with a request for *such information as the administrator is statutorily required to furnish.* Thus, the Court finds that Defendant supplied Mr. Jarrard, in a timely fashion, those documents which he requested which came within the provisions of 29 U.S.C. § 1024(b) (4). Accordingly, the Court finds in favor of Defendant with regard to Plaintiff Jarrard's failure to provide documents claim.

CONCLUSION

For the reasons more fully outlined in the Memorandum, the Court finds in favor of Defendant with respect to the following claims: (1) Count II, Plaintiffs' breach of fiduciary duties claim as to all Plaintiffs except Ron Fitzsimmons and Jack Jarrard; (2) Count IV, Plaintiffs' equitable estoppel claim as to all Plaintiffs; (3) Count V, Plaintiff Jack Jarrard's

failure to provide information claim; (4) Count VI, Plaintiffs' breach of contracts claim as to all Plaintiffs; and (5) Plaintiffs's collateral estoppel claim.

The Court, however, finds Defendant liable to Plaintiffs Fitzsimmons and Jarrard with respect to their breach of fiduciary duties claim. As such, the damages phase of the trial will proceed as to Plaintiffs Fitzsimmons and Jarrard.

A final judgment shall be entered in this case, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, upon completion of the damages phase of the trial, which shall be scheduled forthwith.

/s/ _____
ROBERT L. ECHOLS
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed Dec. 11, 2002]

No. 00-6475

CLAY K. JAMES, *et al.*,
Plaintiffs-Appellants,

v.

PIRELLI ARMSTRONG TIRE CORPORATION,
Defendant-Appellee.

ORDER

BEFORE: BATCHELDER and CLAY, *Circuit Judges*; and ALDRICH,* *District Judge.*

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

*Hon. Ann Aldrich, Senior United States District Judge for the Northern District of Ohio, sitting by designation.

Supreme Court, U.S.
FILED
APR 11 2003
OFFICE OF THE CLERK

No. 02-1327

IN THE

Supreme Court of the United States

PIRELLI ARMSTRONG TIRE CORPORATION,

Petitioner,

v.

CLAY K. JAMES, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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PRELIMINARY STATEMENT

Petitioner mischaracterizes the question presented in this case. This case does not address the ramifications of an employer's accurate representation about current ERISA plan benefits, followed by an unforeseen change in the plan. Rather, this case addresses *inaccurate* representations by a fiduciary to plan participants regarding the possibility of future changes in the plan. Contrary to Petitioner's assertions, the decision at issue neither expressly nor implicitly requires an employer to constantly remind plan participants of its right to alter benefits. Rather, the Sixth Circuit simply found that, based upon the particular facts and circumstances of this case, and pursuant to universally recognized principles articulated by this Court and prior Sixth Circuit decisions, Pirelli's representations to Respondents were inaccurate, misleading, and constituted a breach of fiduciary duty. In this respect, the decision imposes no additional obligations upon employers, but rather is in accord with existing law on this issue.

There are no compelling reasons to grant review on a writ of certiorari in this matter. In reaching the conclusion that Pirelli violated its fiduciary obligations to Respondents, the Sixth Circuit engaged in a careful and thoughtful comparative analysis of its prior decisions, as well as the decisions of this Court and other circuits addressing the parameters of a plan administrator's fiduciary duty under ERISA. The Sixth Circuit expressed no intention to depart from its own precedents or that of its sister circuits on this issue, nor does its holding have such an effect. The facts of this case are easily distinguishable from the cases which Petitioner claims represent "the other side" of this issue. There is no conflict. Moreover, any review of this case would

require this Court to second-guess the Sixth Circuit's factual conclusions and application of properly stated rules of law to these conclusions. As such, this case is not appropriate for review by this Court, and the petition for a writ of certiorari should be denied.

RESPONSE TO PETITIONER'S STATEMENT OF THE CASE

Petitioner presents a heavily edited version of the material facts in this matter, addressing the communications at issue simply by stating that Pirelli's representatives "accurately" told Respondents that their health benefits would continue "for life", and in doing so did not repeat the reservation of rights in the SPD. Pet. 5.[1] This is a gross oversimplification of the factual record before both the district court and the Sixth Circuit. Petitioner fails to acknowledge the undisputed evidence demonstrating Pirelli created a situation where it was virtually impossible for employees to obtain accurate information about the plan. For instance, the company did not provide a copy of the plan in its Nashville facility. Rather, employees were told to bring any questions regarding early retirement to trusted long-time benefits advisor Shirley Pike, who admittedly had never seen or read the plan documents. App. 4a-5a.

Unfortunately, Ms. Pike harbored a fundamental misunderstanding of the company's right to make future alterations to benefits afforded under the plan, as evidenced by her statements to at least two employees that the

1. For citation purposes, the petition for a writ of certiorari is referred to herein by the abbreviation "Pet." Materials included in the appendices to the petition are referred to by the abbreviation "App."

reservation of rights clause in the SPD was written for the benefit of Pirelli to enable the company to change insurance carriers. As Pike put it, "If I had that discussion, I am sure I would have talked about insurance carriers." App. 5a. Pike also admitted that she did not know whether she had the role of a fiduciary relating to the dissemination of information about the early retirement program to the company's employees because she was not sure what a "fiduciary" was. App. 5a. Moreover, Pirelli's General Counsel and Secretary, Sherwood Willard, acknowledged that it would have been prudent for Pike to have read the plan and to have had a copy of it in her office because she was responsible for providing accurate information to employees about its terms and conditions. App. 6a.

Petitioner's truncated statement of the facts also omits the testimony from each Respondent regarding his or her interactions with Pirelli representatives. This testimony conveys the background and context of the communications which are at issue in this case. The Sixth Circuit, recognizing that a determination as to whether a statement is inaccurate or misleading cannot be made apart from the context of the statement, included excerpts from all the Respondents' testimony in its overview of the material facts.[2] *See* App. 7a-12a. This testimony demonstrates that Respondents were seeking information regarding not only the current benefits

2. Petitioner complains that the Sixth Circuit did not remand this case to the trial court to make a finding on the specific contents of the language Pirelli's representatives used with Respondents. Pet. 14. However, Respondents' accounts of the content of their exchanges with Pirelli representatives regarding the OPS Program have never been a matter of dispute in this case. Indeed, the testimony of Respondents is in accord with the testimony of Ms. Pike as to the content of these interactions.

available to early retirees, but also the possibility of future changes in benefits, and that the issue of whether such changes were possible was addressed—inaccurately—by Pirelli's representatives. Indeed, Petitioner's assertion that none of the Respondents ever alleged or testified that a Pirelli representative told them that the ERISA Plan "could not" be changed is simply incorrect, as demonstrated by the following exchange between Pike and Respondent Ruby Panzera:

> Q: Did you ever ask Ms. Pike if the company could change your health insurance benefits after you retired?
>
> A: Well yes, we did discuss with her, you know, was this—"Is this a definite, you know, is this firm?" And she said, "Yes, it would not change as long as—you know, would remain this way until our death."

App. 9a; R. 137, Ruby Panzera, TR 4/26/99, Vol. I pp. 190-191, JA pp. 255-56.

Similarly, Respondent Paul Skelley testified that when Ms. Pike gave him a sheet summarizing the retirement program, he asked "if there was anything in small print anywhere else in any kind of contract that I lose any of this after I become 65?", to which Ms. Pike responded that he would have the coverage "until the day [he] die[d]." App. 9a. Respondent B.L. Cook testified that he asked Ms. Pike "what to expect" in the future regarding coverage, to which she responded that he would receive the stated medical benefits to "including the drug card, for as long as I live and if I died before my wife then she would receive those benefits as long as she lived providing she didn't remarry."

App. 10a; R. 137, Cook, TR 4/28/99, Vol. II, pp. 257-58, JA pp. 282-283.

Of course, it is hardly surprising that Ms. Pike inaccurately depicted future benefits as not being subject to change, since she herself was admittedly not aware that Pirelli had reserved the right to make such changes.

REASONS FOR DENYING THE PETITION

I. *Petitioner Has Merely Alleged Erroneous Findings Of Fact By the Sixth Circuit*

While the district court held that Pirelli did not make any misleading statements to Respondents, except in the instances where Ms. Pike responded inaccurately to direct questions about the meaning of the reservation of rights clause in the SPDs (App. 45a-46a), the Sixth Circuit disagreed. It found that Pirelli did provide materially false, inaccurate and misleading information regarding future benefits to all of the Respondents. App. 28a. This determination was necessarily based upon several factual conclusions pertaining to the information Respondents were seeking from Pirelli as well as the actual and perceived meaning and impact of the information conveyed by Pirelli's representatives. Indeed, the questions of whether or not Respondents were asking whether benefits "could" be changed, and whether or not they were told by Pirelli that benefits "could not" be changed—questions which Petitioner claims were wrongly decided by the Sixth Circuit—inarguably involve factual determinations.

It is not the preferred province of this Court to second-guess a lower court's findings of fact, or to reassess conclusions regarding the inferences to be drawn from these facts. *See* Supreme Court Rule 10(c). Any review of the Sixth Circuit's holding in this case would necessarily require such factual analysis. Therefore, the petition should be denied.

II. *The Sixth Circuit's Decision is Based Upon the Unique Facts and Circumstances of This Case And Is Not in Conflict With The Decisions of Other Courts of Appeal On The Issue Presented*

Undoubtedly, an employer or plan administrator has the right to alter or amend its welfare benefits plan notwithstanding prior accurate representations regarding current benefits under the plan. That right is not at issue in this case. However, contrary to Petitioner's suggestion, there is no authority in the Sixth Circuit or elsewhere holding that a reservation of rights provision in an SPD insulates an employer from its fiduciary duty, recognized by this Court[3], to provide complete and accurate information about future benefits under an ERISA Plan. Were it otherwise, as the Sixth Circuit correctly pointed out in this case, an employer or plan administrator could provide, on its own initiative, false or inaccurate information about the future benefits of a plan without breaching its fiduciary duty under ERISA. App. 25a. This would be contrary to the basic concept of a fiduciary duty, which "entails not only a negative duty not to misinform, but also an affirmative duty to inform when the

3. This Court has held that "conveying information about the likely future of plan benefits [is] a discretionary act of plan administration" giving rise to a fiduciary duty. *Varity Corp. v. Howe*, 516 U.S. 489, 504, 116 S. Ct. 1065, 134 L. Ed. 2d 130 (1996).

trustee knows that silence might be harmful." App. 25a. (citing *Krohn v. Huron Memorial Hospital*, 173 F.3d 542, 548 (6th Cir. 1999)).

A. The Sixth Circuit's Decision Is Fact-Specific

The question of whether an employer provided false or inaccurate information about the future benefits of an ERISA plan necessarily involves a fact-specific analysis. The particular facts and circumstances of each case, including the background leading up to the communications at issue and the context and nature of the exchanges between employer and employee, will determine whether a materially misleading representation has been made.

In this case, the Sixth Circuit appropriately engaged in a fact-specific analysis and determined that Pirelli misled the Respondents. Moreover, contrary to Petitioner's assertions, the material facts in this case consist of more than just Pirelli's use of the word "lifetime" to describe benefits under the Plan. Petitioner's attempt to strip away the factual nuances of the communications at issue in this case is understandable, as it cannot otherwise plausibly argue that this decision has any broad-based impact on this area of the law, or that it is in conflict with other decisions to which it bears only superficial factual resemblance. This Court should decline the request to review a fact-specific decision which in reality will have little impact other than, perhaps, with respect to cases involving the same sort of systemic and uniform dissemination of erroneous information and blatantly inaccurate responses to questions by an employer which is presented here.

B. The Decision Presented For Review is In Accord with Sixth Circuit Precedent

In assessing whether the opinion below contributes to a conflict of opinion on the issue presented, it must be noted that the Sixth Circuit engaged in an in-depth and thoughtful analysis of its prior decision in *Sprague v. General Motors Corp.*, 133 F.3d. 388 (6th Cir. 1998) (en banc)—which Pirelli claims represents the "other side" of the supposed conflict—as well as other cases addressing the issue of when employer's representations about plan benefits will constitute a breach of fiduciary duty. App. 15a-19a. Far from rejecting the principles articulated in these supposedly "conflicting" decisions, the Sixth Circuit in this case embraced and applied the analytical framework set forth in *Sprague* in conducting its analysis of the material facts. The Sixth Circuit acknowledged the factual similarities between S*prague* and this case, including the employer's use of the term "lifetime" in both cases to describe the nature of benefits. App. 16a. However, the Sixth Circuit ultimately concluded that the facts presented here are materially distinguishable from *Sprague*, a conclusion which is supported by a comparison of the context and content of the representations made in each case.

For instance, in *Sprague*, the plaintiffs' claims focused not on alleged oral (mis)representations, as in this case, but on written documents, namely plan summaries which informed early retirees that "their health insurance would be paid by GM for life." 133 F.3d at 395. Most of the plan summaries also "unambiguously reserved GM's right to amend or terminate the plan." *Id.* at 401. The plaintiffs' primary argument in *Sprague* was that the juxtaposition of these two statements in the same communication created an ambiguity. *Id.* However, neither the GM plan itself nor the

summaries "state[d] or ***even implie[d]*** that the plaintiffs' benefits were vested." (133 F.3d at 402) (emphasis added). Moreover, while "the company did not tell the early retirees at every possible opportunity *that which it had told them many times before*—namely, that the terms of the plan were subject to change," (133 F.3d at 405) (emphasis added) when individual employees asked about this issue "the answers given, it seems, were accurate—benefits could be changed in the future." *Id.* at 395. On the record before it, the Court in *Sprague* determined that GM's representation to early retirees could not "reasonably be deemed misleading." 133 F.3d at 406.

In this case, unlike in *Sprague*, there is undisputed evidence that the company appointed a plan representative who did not have access to plan documents and did not understand that the company had the right to alter future benefits. Moreover, there is no evidence in the record here, as there was in *Sprague*, that the company told employees "many times" that the terms of the plan were subject to change, or that the company gave accurate answers when asked whether benefits were subject to change. On the contrary, there is no record that Pirelli *ever* mentioned that it had the right to alter or amend benefits under the plan, in any of its group meetings or presentations to early retirees. It is undisputed that Pirelli repeatedly and unequivocally responded to questions posed about the possibility of changes in the plan by saying that such changes would not occur, despite the fact that Respondents were clearly seeking guidance about what could happen in the future.

The Sixth Circuit recognized that the nature of the exchange between Pirelli and Respondents in this case was fundamentally different from the communications at issue in *Sprague*, and that the unique facts of this case implicated

the scenario which *Sprague* had expressly envisioned when it held that "[h]ad an early retiree asked about the possibility of the plan changing, and had he received a misleading answer, or had GM on its own initiative provided misleading information about the future of the plan . . . a different case would have been presented." App. 18a-19a (citing *Sprague*, 133 F.3d at 404-405).

C. The Sixth Circuit's Decision is Not in Conflict With The Decisions of Other Courts of Appeals

Other cases which Pirelli has characterized as being in alignment with *Sprague* and therefore on the "other side" of the issue presented are also easily factually distinguished from this case. For instance, while it is true that, in *Frahm v. Equitable Life Assurance Soc. Of United States*, 137 F.3d 955 (7th Cir. 1998), the Seventh Circuit found no breach of fiduciary duty based upon statements by some plan representatives that benefits would be for a "lifetime", the court also found that the employer had taken adequate precautions to ensure that plan participants were given correct information, including training benefits staff to provide correct advice and providing accurate written descriptions of the employer's right to change the plan. *Id.* at pp. 959-960. Moreover, in *Frahm*, unlike in this case, incidents of potentially confusing oral advice to plan participants were depicted as isolated anomalies which occurred despite the company's precautions. *Id.* at 960 ("claims that one or another bit of advice was misleading do not violate the statute."). These facts stand in stark contrast to this case, where Pirelli uniformly provided misleading information to all employees through a representative who did not understand the ramifications of the reservation of rights clause and was not adequately trained to address these issues.

Other cases cited by Pirelli as being in conflict with the Sixth Circuit's decision in this case do not even address the same issue presented here. For instance, in *Wilson v. Southwestern Bell Tel. Comp.*, 55 F.3d 388 (8th Cir. 1995), employees asked the plan representatives a direct question about an existing fact—i.e., whether the company was planning any additional layoffs which would impact benefits under the Plan.[4] *Id.* at p. 404. The Court in *Wilson* found that the employer did not violate its fiduciary duty by responding that no additional layoffs would occur "if we do a good job growing our business," despite the fact that additional, previously uncontemplated layoffs did later occur. *Id.*

Pirelli's attempt to manufacture a conflict by comparing the holding in this case with the holdings in *Wilson* and other cases addressing the issue of whether an employer is obligated to disclose contemplated future changes in benefits to employees is unpersuasive. Unlike in *Wilson*, the employees in this case did not ask Ms. Pike whether benefits were going to be changed in the future. Rather, they were seeking a broader category of information, encompassing the *possibility* of future changes. Pirelli inaccurately conveyed to Respondents that such changes were not a possibility. This was an inaccurate statement pertaining to subject matter within Pirelli's then-current knowledge. Such a statement is exactly the type of representation which the court in *Sprague* opined would constitute a "different case" from an employer's "accurate representations of its current program." App. 19a (citing *Sprague*, 133 F.3d at 404-405).

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4. The employees in *Wilson* asked questions such as "can we expect more management force reductions down the road?" *Id.* at p. 404.

D. The Sixth Circuit's Decision Is Based On Well-Established Principles of Fiduciary Duty

As stated, this case differs from the supposedly conflicting cases cited by Petitioner in that it involves repeated, ongoing interactions between company representatives and employees where the topic of possible changes in benefits was clearly "on the table." Indeed the evidence in the record undeniably shows that the issue of what could possibly happen to their benefits in the future was very much (and understandably) on the minds of the individuals considering early retirement. However, notwithstanding its knowledge of these concerns, Pirelli continued to issue misleading statements about the nature of these benefits, both on its own initiative and in response to questions specifically addressing whether benefits could be changed.

Petitioner relies on semantics, claiming that while it told employees the plan "would not" change, it never told employees that the plan "could not" change. Such distinctions are meaningless in the analysis of whether Pirelli fulfilled its fiduciary obligation not to mislead these individuals. For example, when Paul Skelley asked whether there was anything "in small print anywhere else" that could cause him to lose any of his benefits (J.A. at 268), it fell to Pirelli to give an accurate response. The true and accurate answer to Mr. Skelley's question, which was entirely within Pirelli's present knowledge, was "yes." Shirley Pike telling Mr. Skelley that he would have benefits until the day he died was *not* an accurate response to his question. It really is not that complicated—Mr. Skelley clearly wanted to know if his benefits could be changed and Pirelli falsely and inaccurately reassured him that this would not happen. Thus, Mr. Skelley concluded, entirely reasonably, that his benefits were indeed

"locked in" for life and not subject to change, and relied upon this conclusion in deciding to take early retirement. Of course, Mr. Skelley's confusion in this regard directly benefited Pirelli.

The failure on the part of Pirelli to provide accurate information to employees considering early retirement was systemic and applicable to all Respondents in this case, even those who were not able to articulate their concerns as well as Mr. Skelley, or the individuals who specifically asked and were misinformed about the meaning of the reservation of rights clause in the SPDs. To hold otherwise would be to find that a plan administrator's fiduciary duty runs only towards those individuals who are able to formulate the "magic words" to address their concerns, despite the fact that all beneficiaries are similarly at risk as a result of the plan administrator's misleading representations or omissions regarding benefits. Such a conclusion runs contrary to the well-established principle that a fiduciary has an affirmative duty to provide information where it knows that its failure to do so might cause harm. This concept was recognized by the Third Circuit Court of Appeals in *In re Unisys Corp. Retiree Med. Benefit "ERISA" Litigation*, 57 F.3d 1255, 1264 (3d Cir. 1995) and appropriately applied by the Sixth Circuit to bring about the correct result in this case.

The Sixth Circuit's ruling in this case does not affect the ability of any employer to alter or amend a plan; nor does it undermine the *Sprague* Court's admonition that an employer's "failure to begin every communication to plan participants with a caveat" (133 F.3d at 405) is not a violation of its fiduciary duty under ERISA. Rather, the Sixth Circuit has simply followed the mandate set forth in *Sprague*, that a plan fiduciary may not mislead beneficiaries.

III. *Petitioner Alleges That The Sixth Circuit Misapplied A Properly Stated Rule Of Law*

Petitioner does not contend that the Sixth Court misstated any rule of law applicable to the fiduciary duty of ERISA plan administrators. Indeed, both Petitioner and Respondents agree that this duty is set forth in the ERISA statute (29 U.S.C. § 1104) and further defined in Supreme Court decisions such as *Varity*, as well as the Sixth Circuit's previous decision in *Sprague*. Petitioner simply contends that the Sixth Circuit incorrectly applied these rules in determining whether Pirelli's representations constituted a breach of its fiduciary duty. This Court has stated that will only rarely grant a petition for writ of certiorari based upon an alleged misapplication of a properly stated rule of law (*See* Supreme Court Rule 10(c)), and petitioner has failed to present any compelling reason why it should do so in this case.

IV. *The Sixth Circuit's Decision Does Not Undermine Congressional Policies Regarding ERISA*

Petitioner's arguments that the Sixth Circuit's decision somehow undermines the authority of written plan documents relies upon its mischaracterization of the holding and of the issues presented in this case. This case does not support the proposition that any oral representations of an employer may effectively amend an ERISA plan. Rather, the only general principle or rule of law which may be drawn from the Sixth Circuit's fact-specific holding is simply that an employer may not mislead employees by systematically and uniformly representing to them that the truth—in this case the truth about what could happen to plan benefits in the future—is something different than what is stated in the plan documents. A rule of law prohibiting fiduciaries from

misleading beneficiaries is neither controversial nor novel. Indeed, Petitioner's musings about what Congress intended with respect this issue ignores that body's codification of the fiduciary duty of ERISA plan administrators.

Petitioner's arguments that the Sixth Circuit's decision will "prompt a new cottage industry of litigation" involving swearing contests between employers and employees, thereby deterring employers from offering ERISA welfare benefits plan, is completely unsupported. Petitioner ignores the fact that the Third Circuit, in *Unysis*, issued a similar holding, based on similar facts, *over eight years ago*. Petitioner does not point to any empirical evidence demonstrating any increase in ERISA breach of fiduciary duty claims or decrease in ERISA welfare benefits plans during that time. Indeed, it seems doubtful that employers would forego offering benefits packages which permit them to effectively compete for employees, simply because they are required to communicate truthfully and accurately with employees regarding the nature of the benefits provided.

Similarly, Petitioner's argument that the "unpredictably" engendered by the supposed conflict of opinion on this issue will discourage employers from explaining welfare benefits programs to employees is unpersuasive, particularly in the context of early retirement incentive programs. Employers clearly will always have a self-interested motive to engage in communications with employees about such programs. To the extent the Sixth Circuit's decision has any impact beyond the parties to the case, it will, hopefully, encourage ERISA plan administrators involved in similar scenarios to answer benefits questions truthfully and to take steps to ensure that beneficiaries are not provided with inaccurate and misleading information regarding plan benefits. To the

extent this places a "burden" upon employers, it is, respectfully, a burden which is in accord with well-established law and which this Court should be most reluctant to disturb.

CONCLUSION

For all of these reasons, the Court should deny the petition for writ of certiorari.

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IN THE

Supreme Court of the United States

PIRELLI ARMSTRONG TIRE CORPORATION,
Petitioner,

v.

CLAY K. JAMES, *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Contrary to respondents' brief in opposition, the Sixth Circuit's decision did not make findings of fact or hold that any of the trial court's findings were clearly erroneous. Rather, the Sixth Circuit applied a broad rule of law that swept up and determined the cases of twenty-one respondents as a matter of law. The sweeping impact of the Sixth Circuit's decision places it in conflict: (i) with other circuits that have declined to interpret descriptions of future benefits under a plan then in effect as implicit promises never to change those benefits, even if the reservation of rights to make future changes is not reiterated, and (ii) more broadly, with those circuits that have held that an ERISA administrator need not disclose even active internal consideration of a potential future plan change until the change is under "serious consideration." By finding that Pirelli's statements

regarding future benefits under its welfare plan were misleading as a matter of law, the Sixth Circuit has joined the few other circuits that have held or permitted a jury to find that a description of future benefits is a misrepresentation if the administrator does not affirmatively assert the employer's right to modify the plan. Because the decision aggravates the already difficult task of administering an ERISA plan, creates new obligations for plan fiduciaries, and undermines the policies and goals of ERISA, the Court should grant Pirelli's petition for writ of certiorari.

REASONS FOR GRANTING THE PETITION

I. THE SIXTH CIRCUIT HELD THAT PIRELLI BREACHED ITS FIDUCIARY DUTY AS A MATTER OF LAW.

Respondents incorrectly argue that the case is fact specific because it turns on "findings of fact by the Sixth Circuit." Br. Opp. 5. Federal circuit courts do not have the power to make fact findings—only district courts do[1]—and when the court of appeals held that Pirelli breached its fiduciary duty to respondents, it made that ruling as a matter of law, not fact.

At trial, the district court made a fact finding that "[i]n the present case, like *Sprague*, Defendant's statements to Plaintiffs that they would retain their medical benefits 'for life' were true under the terms of the then-existing plan." Pet. App. 45a-46a. The district court distinguished between

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[1] "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*." *Anderson* v. *City of Bessemer*, 470 U.S. 564, 573 (1985). The Sixth Circuit in this case did not reverse any finding of fact or even mention FED. R. CIV. P. 52(a) ("Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.").

Fitzsimmons and Jarrard and respondents because it found that Shirley Pike erroneously told those two—and only those two, in response to their questions about the reservation of rights language in the summary plan description—that Pirelli could not change the plan. Pet. App. 46a. In reversing the district court's judgment, the court of appeals did not specifically reject these or any of the district court's other factual findings as clearly erroneous; nor did the court remand for a new trial of any liability issue.

Instead, the court of appeals held that Pirelli's communications with each and every plaintiff breached its ERISA fiduciary duty because Pirelli's statements that the benefits under its welfare plan would continue for life or throughout retirement were, as a matter of law, inaccurate or misleading statements about Pirelli's right to change the plan. Pet. App. 27a. In other words, notwithstanding the fact that the plan then in effect undisputedly provided a consistent and unchanging level of benefits to retirees for the rest of their lives, the court of appeals held that Pirelli's descriptive statements to that effect were inaccurate and misleading as a matter of law. Pet. App. 28a. The court of appeals' holding that Pirelli breached its fiduciary duty as a matter of law imposes strict liability for an accurate statement of benefits and thus ineluctably requires a fiduciary to additionally explain the reserved right to amend the plan. That explanation is not required in most other circuits or by the Court's precedent.

II. THE DECISION DEEPENS A CIRCUIT SPLIT ON THE DUTY OF EMPLOYERS TO DISCLOSE THE MERE POTENTIAL FOR PLAN CHANGES.

Because the court of appeals' holding reaches each and every plaintiff, it cannot be read any narrower than holding that an oral description of future benefits as lasting "for life," even if accurate under the terms of the plan, is as a matter of

law an inaccurate representation that the employer cannot or will not change the plan. On its face, the decision conflicts with *Frahm* in holding that oral descriptions of benefits as lasting "for life" or as "lifetime" communicates that an employer does not have the power to change the plan. *See Frahm* v. *Equitable Life Assurance Soc'y of United States*, 137 F.3d 955, 959-60 (CA7 1998). Respondents' attempt to distinguish *Frahm* on the basis that the administrator in *Frahm* had only sporadically described the benefits as "lifetime," Br. Opp. 10, is untenable.

In addition to standing in direct contrast with *Frahm*, the court of appeals made the same mistake the Third Circuit made in *In re Unisys Corp. Retiree Med. Benefit ERISA Litig.*: it held that the phrases "for . . . life" or "lifetime" indicate that the employer has surrendered its right to change or alter the plan, even though the same phrases were accurately used to describe how long benefits would last. 57 F.3d 1255, 1259, 1265 (CA3 1995). Neither case explains why the phrase "for life" indicates the plan cannot be changed when other terms used to describe the duration of future benefits do not. *Id.* Indeed, there is no reason that it should, and hence no reason to limit the application of the decision below to plan descriptions using the words "lifetime" or "for life."

Under the Sixth Circuit's decision, unlike *Frahm*, if an administrator of a plan that provides retiree benefits until death answers the question "how long does the retirement plan provide benefits for?" with "for life," the administrator will effectively lose its statutory right to alter the plan. *See* Pet. App. 27a. Likewise, if an administrator of a plan that provides retiree benefits for five years answers the same question with "five years," that administrator will not be able to alter the plan within that five-year period without risking litigation. The decision makes an accurate description of the duration of future benefits under a current plan a representation that those benefits cannot or will not be changed.

In effect, then, the decision imposes a duty to accompany any description of future plan benefits with a repetition of the employer's right to alter the plan. Otherwise, there is no way for the employer to conclusively demonstrate that its statements were a description of future benefits under the plan and not a gratuitous promise not to change the plan. By effectively creating that burden, the decision creates a conflict with other circuits' carefully tailored holdings allowing an employer to describe future benefits without repeating the reservation of the right to change the plan and, indeed, expressly not requiring discussion of even potential plan changes unless those changes are under serious consideration.

This split has more than theoretical consequences. An employer with a plan like Pirelli's located in the Eighth Circuit, for example, when asked about the duration of post-retirement benefits under its plan, could answer "for life" without losing its right to later alter the plan. Even if the employer was (not yet seriously) considering shortening the term of benefits at the time, the fact that a statement about the future of the plan was made without a restatement of the employer's right to change the plan would not make the statement a breach of the administrator's fiduciary duty. *See Wilson* v. *Southwestern Bell Tel. Co.*, 55 F.3d 399, 404-05 (CA8 1995) (holding that employer's statement that it "absolutely will not enrich the plan" did not lead to a breach of fiduciary duty when it later changed the plan); *see also Mushalla* v. *Teamsters Local No. 863 Pension Fund*, 300 F.3d 391, 396 (CA3 2002); *Fischer* v. *Phila. Elec. Co.*, 96 F.3d 1533, 1539 (CA3 1996); *Bins* v. *Exxon Co. U.S.A.*, 220 F.3d 1042, 1049 (CA9 2000) (*en banc*); *Hockett* v. *Sun Co., Inc.*, 109 F.3d 1515, 1523 (CA10 1997); *Barnes* v. *Lacy*, 927 F.2d 539, 544 (CA11 1991). But in the Sixth Circuit, the same answer to the beneficiary would conclusively establish that the employer had breached its fiduciary duty if it later

shortened the term of benefits, even if no change was even remotely contemplated at the time.

The rule applied by the Sixth Circuit in deciding this case cannot coexist with the numerous decisions adopting the "serious consideration" rule because the Sixth Circuit imposed strict liability for a plan description that the "serious consideration" rule would have absolutely protected. Respondents erroneously argue that *Wilson* and the other serious-consideration cases are distinguishable because, in those cases, the beneficiaries asked whether the employer intended to change the plan before they asked whether it could change the plan. Br. Opp. 11. But no court ever made a finding that the plaintiffs (with the exception of Jarrard and Fitzgerald, who prevailed below) asked whether the plan could be changed, or that Pirelli told them it could not: the district court found the opposite. Pet. App. 45a. The court of appeals' decision to avoid the impact of those findings by applying a rule of strict liability deepened the conflict with the holdings of other circuits by eliminating the factual distinctions that might have served to narrow application of the decision to limited circumstances.

III. THE SIXTH CIRCUIT'S DECISION UNDERMINES THE POLICIES BEHIND ERISA.

Respondents inaccurately assert that the Sixth Circuit's decision will no more undermine the policies behind ERISA than *Unisys*, decided more than eight years ago. Br. Opp. 15. In *Unisys*, however, the word "lifetime" and other similar phrases were contained in the summary plan description as well as in other verbal and written communications. 57 F.3d, at 1259-60. In this case, on the other hand, the oral communications are the only ones upon which plaintiffs rely. The court of appeals' holding thus presents a risk that *Unisys* did not—that a beneficiary (or would-be beneficiary) could entirely skirt ERISA's written-plan requirement by asserting

that an oral statement had modified or waived the employer's ability to later change the plan. Moreover, *Frahm* and the serious-consideration cases decided in the interim had implicitly disregarded the core of *Unisys*, but the Sixth Circuit's decision in this case has reinvigorated that theory of liability and solidified the conflict among the circuits.

Allowing breach-of-fiduciary-duty lawsuits based on a failure to repeat a written reservation of rights greatly expands the limited exception to the written-plan requirement that the Court recognized in *Varity Corp.* v. *Howe*, 516 U.S. 489 (1996). The risks of miscommunication—and hence unpredictability—are greatly reduced when both beneficiaries and administrators understand that the written plan documents are definitive. *Cf. Moore* v. *Metro Life Ins. Co.*, 856 F.2d 488, 492 (CA2 1988) ("Were all communications between an employer and plan beneficiaries to be considered along with the SPDs as establishing the terms of a welfare plan . . . [p]redictability as to the extent of future obligations would be lost.").

If this decision is not reversed, ERISA's writing requirement will be severely undermined, employers will be unable to accurately predict their ERISA obligations, and, ultimately, employers will be less willing to provide welfare plans or to permit verbal descriptions of future plan benefits.

CONCLUSION

For all of these reasons, and those stated in the petition, the Court should grant the petition for writ of certiorari.

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